

CHAPTER 97-240

House Bill No. 1411

An act relating to the administration of trusts and estates; amending s. 689.225, F.S.; providing a statement of the rule against perpetuities; amending s. 709.08, F.S.; authorizing certain corporations to serve as an attorney in fact; amending s. 733.707, F.S.; increasing the ceiling on funeral expenses; defining the term "right of revocation" with respect to the order of payment of expenses and obligations of an estate; amending s. 737.111, F.S.; revising provisions with respect to execution requirements for express trusts; providing for the application of the section; amending s. 737.2041, F.S., relating to trustee's attorney's fee; revising procedures for determining attorney's fees; providing for determining fees for an attorney who is retained for limited services; revising the list of services that constitute ordinary services in an initial trust administration; deleting an exception from the applicability of presumptive fees for a corporate fiduciary that serves as a trustee or cotrustee; amending s. 737.303, F.S.; revising provisions with respect to the duty of the trustee to inform and account to beneficiaries to require information to the grantor with respect to certain trusts; amending s. 737.308, F.S.; providing for specified notice to the trustee and caveator; amending s. 518.112, F.S.; providing for delegation of investment functions; amending s. 733.817, F.S.; revising provisions of law with respect to the apportionment of estate taxes; amending s. 738.12, F.S.; providing conditions under which a trust beneficiary is considered an income beneficiary; amending s. 744.441, F.S.; increasing the ceiling on funeral expenses; amending ss. 655.936 and 733.604, F.S.; providing requirements on opening certain safe-deposit boxes; requiring an inventory; requiring filing of inventories with the court; providing an effective date.

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

Section 1. Paragraph (e) is added to subsection (2) of section 689.225, Florida Statutes, to read:

689.225 Statutory rule against perpetuities.—

(2) STATEMENT OF THE RULE.—

(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.

Section 2. Subsection (2) of section 709.08, Florida Statutes, is amended to read:

709.08 Durable power of attorney.—

(2) WHO MAY SERVE AS ATTORNEY IN FACT.—The attorney in fact must be a natural person who is 18 years of age or older and is of sound mind, or a financial institution, as defined in chapter 655, with trust powers, having a place of business in this state and authorized to conduct trust business in this state. A not-for-profit corporation, organized for charitable or religious purposes in this state, which has qualified as a court-appointed guardian prior to January 1, 1996, and which is a tax-exempt organization under 26 U.S.C. s. 501(c)(3), may also act as an attorney in fact. Notwithstanding any contrary clause in the written power of attorney, no assets of the principal may be used for the benefit of the corporate attorney in fact, or its officers or directors.

Section 3. Subsections (1) and (3) of section 733.707, Florida Statutes, are amended to read:

733.707 Order of payment of expenses and obligations.—

(1) The personal representative shall pay the expenses of the administration and obligations of the estate in the following order:

(a) Class 1.—Costs, expenses of administration, and compensation of personal representatives and their attorneys' fees.

(b) Class 2.—Reasonable funeral, interment, and grave marker expenses, whether paid by a guardian under s. 744.441(16), the personal representative, or any other person, not to exceed the aggregate of \$6,000 ~~\$3,000~~.

(c) Class 3.—Debts and taxes with preference under federal law.

(d) Class 4.—Reasonable and necessary medical and hospital expenses of the last 60 days of the last illness of the decedent, including compensation of persons attending him.

(e) Class 5.—Family allowance.

(f) Class 6.—Arrearage from court-ordered child support.

(g) Class 7.—Debts acquired after death by the continuation of the decedent's business, in accordance with s. 733.612(22), but only to the extent of the assets of that business.

(h) Class 8.—All other claims, including those founded on judgments or decrees rendered against the decedent during his lifetime, and any excess over the sums allowed in paragraphs (b) and (d).

(3) Any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (e) (e), either alone or in conjunction with any other person, is liable for the expenses of the administration of the decedent's estate and enforceable claims of the decedent's creditors to the extent the decedent's estate is insufficient to pay them as provided in s. 733.607(2).

(a) For purposes of this subsection, any trusts established as part of, and all payments from, either an employee annuity described in s. 403 of the Internal Revenue Code of 1986, as amended, an Individual Retirement Account, as described in s. 408 of the Internal Revenue Code of 1986, as amended, a Keogh (HR-10) Plan, or a retirement or other plan established by a corporation which is qualified under s. 401 of the Internal Revenue Code of 1986, as amended, shall not be considered a trust over which the decedent has a right of revocation.

(b) For purposes of this subsection, any trust described in s. 664 of the Internal Revenue Code of 1986, as amended, shall not be considered a trust over which the decedent has a right of revocation.

(c) This subsection shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in s. 414(p) of the Internal Revenue Code of 1986, as amended.

(d) For purposes of this subsection, property held or received by a trust to the extent that the property would not have been subject to claims against the decedent's estate if it had been paid directly to a trust created under the decedent's will or other than to the decedent's estate, or assets received from any trust other than a trust described in this subsection, shall not be deemed assets of the trust available for the payment of the expenses of administration of and enforceable claims against the decedent's estate.

(e) For purposes of this subsection, a "right of revocation" is a power retained by the decedent, held in any capacity, to:

1. Amend or revoke the trust and revest the principal of the trust in the decedent; or

2. Withdraw or appoint the principal of the trust to or for the decedent's benefit.

Section 4. Section 737.111, Florida Statutes, is amended to read:

737.111 Execution requirements for express trusts.—

(1) The testamentary aspects of a trust defined in s. 731.201(33), are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will.

(2) The testamentary aspects of a trust created by a nonresident of Florida, either before or after this law takes effect, are not invalid because the trust does not meet the requirements of this section, if the trust is valid under the laws of the state or country where the settlor was at the time of execution.

(3) The testamentary aspects of an amendment to a trust are invalid unless the amendment is executed by the settlor with the same formalities as a will.

(4) For the purposes of this section, the term “testamentary aspects” means those provisions of the trust that dispose of the trust property on or after the death of the settlor other than to the settlor’s estate.

(5) This section shall not apply to trusts established as part of an employee annuity described in s. 403 of the Internal Revenue Code of 1986, as amended, an Individual Retirement Account as described in s. 408 of the Internal Revenue Code of 1986, as amended, a Keogh (HR-10) Plan, or a retirement or other plan that is qualified under s. 401 of the Internal Revenue Code of 1986, as amended.

(6) This section shall not apply to trust instruments executed prior to October 1, 1995.

Section 5. Section 737.2041, Florida Statutes, is amended to read:

737.2041 Trustee’s attorney’s fees.—

(1) If The attorney retained by the trustee of a trust described in s. 733.707(3) retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is shall be entitled to reasonable compensation for those legal services, rendered in the initial administration of the trust payable from the assets of the trust without court order. If the trustee of a trust described in s. 733.707(3) retains an attorney to render legal services in connection with the initial administration of a trust, the trustee and the attorney may agree to compensation that is determined in a manner or amount other than the manner or amount provided in this section. The agreement is not binding upon a person who bears the impact of the compensation unless that person is a party to or otherwise consents to be bound by the agreement. The agreement may provide that the trustee is not individually liable for the attorney’s fees and costs.

(2) The attorney, the trustee, and persons bearing the impact of the compensation may agree to compensation determined in a different manner than provided in this section.

(2)(3) Unless otherwise agreed, compensation for ordinary services based upon the value of the trust assets immediately following the settlor’s death and the income earned by the trust during initial administration at the rate of 75 percent of the schedule provided in s. 733.6171(3)(a)-(h) is presumed to be reasonable total compensation for ordinary services of all attorneys employed generally to advise trustees concerning their duties in initial trust administration.

(3) An attorney who is retained to render only limited and specifically defined legal services shall be compensated as provided in the retaining agreement. If the amount or method of determining compensation is not provided in the agreement, the attorney is entitled to a reasonable fee, taking into account the factors set forth in subsection (6).

(4) Ordinary services of the attorney in an initial trust administration for a trustee include legal advice and representation concerning the trustee's duties where applicable, relating to:

(a) Review of the trust instrument and each amendment for legal sufficiency and interpretation.

(b) Implementation of substitution of the successor trustee.

(c) Persons who must or should be served with required notices and the method and timing of such service.

(d) The obligation of a successor to require a former trustee to account.

(e) The trustee's duty to protect, insure, and manage trust assets and the trustee's liability relating to these duties.

(f) The trustee's duty regarding investments imposed by the prudent investor rule.

(g) Contributions due to the personal representative of settlor's estate for payment of administrative expenses or creditor claims and estate taxes.

(h) The trustee's obligation to inform and account to beneficiaries and the method of satisfaction of these obligations; the liability of the trust and trustee to the settlor's creditors; the advisability or necessity for probate proceedings to bar creditors; and the contribution requirements to the settlor's probate estate.

~~(i) Creditor procedures and direct payment or compromise and satisfaction of claims against the trust assets.~~

~~(i)(j)~~ Identifying tax returns required to be filed by the trustee, the trustee's liability for payment of taxes, and the due date of returns.

~~(j)(k)~~ Obtaining nontaxable certificate and receipt, if not done by a personal representative.

~~(k)(l)~~ Order of payment of expenses of administration of the trust, ~~contribution to the settlor's estate or claims filed against trust assets~~, and order and priority of abatement of bequests and legacies in the trust.

~~(l)(m)~~ Distribution of income or principal to beneficiaries or funding of further trusts provided in the governing instrument.

~~(m)(n)~~ Preparation of any legal documents required to effect distribution.

~~(n)(o)~~ Fiduciary duties, avoidance of self-dealing, conflicts of interest, duty of impartiality, and obligations to beneficiaries.

~~(o)(p)~~ If there is a conflict of interest between a trustee who is a beneficiary and other beneficiaries of the trust, advice to the trustee on limitations of certain authority of the trustee regarding discretionary distributions or exercise of certain powers and alternatives for appointment of an independent trustee and appropriate procedures.

~~(p)(q)~~ Procedures for trustee's discharge from liability for administration of trust upon termination or resignation.

(5) ~~When a corporate fiduciary is serving as trustee or cotrustee of a trust described in s. 733.707(3), the presumptive fee for ordinary services and the list of what constitutes ordinary services in subsections (3) and (4) shall not apply, and what constitutes ordinary services and reasonable compensation for those services shall instead be determined under the particular facts and circumstances applicable to that trust.~~ In addition to the attorney's fees for ordinary services, the attorney for the trustee shall be allowed further reasonable compensation for any extraordinary service. What is an extraordinary service may vary depending on many factors, including the size of the trust. Extraordinary services may include, but are not limited to:

(a) Involvement in a trust contest, trust construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceedings, apportionment of estate taxes, or other adversary proceedings or litigation by or against the trust.

(b) Representation of the trustee in audit or any proceeding for adjustment, determination, or collection of any taxes.

(c) Tax advice on postmortem tax planning, including, but not limited to, disclaimer, renunciation of fiduciary commission, alternate valuation date, allocation of administrative expenses between tax returns, the QTIP or reverse QTIP election, allocation of GST exemption, qualification for Internal Revenue Code ss. 303 and 6166 privileges, deduction of last illness expenses, distribution planning, asset basis considerations, throwback rules, handling income or deductions in respect of a decedent, valuation discounts, special use and other valuation, handling employee benefit or retirement proceeds, prompt assessment request, or request for release of personal liability for payment of tax.

(d) Review of estate tax return and preparation or review of other tax returns required to be filed by the trustee.

(e) Preparation of decedent's federal estate tax return. If this return is prepared by the attorney, a fee of one-half of 1 percent up to a value of \$10 million and one-fourth of 1 percent on the value in excess of \$10 million, of the gross estate as finally determined for federal estate tax purposes, is presumed to be reasonable compensation for the attorney for this service. These fees shall include services for routine audit of the return, not beyond the examining agent level, if required.

(f) Purchase, sale, lease, or encumbrance of real property by the trustee or involvement in zoning, land use, environmental, or other similar matters.

(g) Legal advice regarding carrying on of decedent's business or conducting other commercial activity by the trustee.

(h) Legal advice regarding claims for damage to the environment or related procedures.

(i) Legal advice regarding homestead status of trust real property or proceedings involving the status.

(j) Involvement in fiduciary, employee, or attorney compensation disputes.

(k) Considerations of special valuation of trust assets, including discounts for blockage, minority interests, lack of marketability, and environmental liability.

(6) Upon petition of any interested person in a proceeding to review the compensation paid or to be paid to the attorney for the trustee, the court may increase or decrease the compensation for ordinary services of the attorney for the trustee or award compensation for extraordinary services if the facts and circumstances of the particular administration warrant. In determining reasonable compensation, the court shall consider all of the following factors giving such weight to each as it may determine to be appropriate:

(a) The promptness, efficiency, and skill with which the initial administration was handled by the attorney.

(b) The responsibilities assumed by, and potential liabilities of, the attorney.

(c) The nature and value of the assets that are affected by the decedent's death.

(d) The benefits or detriments resulting to the trust or its beneficiaries from the attorney's services.

(e) The complexity or simplicity of the administration and the novelty of issues presented.

(f) The attorney's participation in tax planning for the estate, the trust, and the trust's beneficiaries and tax return preparation or review and approval.

(g) The nature of the trust assets, the expenses of administration, and the claims payable by the trust and the compensation paid to other professionals and fiduciaries.

(h) Any delay in payment of the compensation after the services were furnished.

(i) Any other relevant factors.

(7) The court may determine reasonable attorney's compensation without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, an expert witness fee may be awarded by the court and paid from the assets of the trust. The court may, in its discretion, direct from what part of the trust it shall be paid.

(8) If a separate written agreement regarding compensation exists between the attorney and the settlor, the attorney shall furnish a copy to the

trustee prior to commencement of employment and, if employed, shall promptly file and serve a copy on all interested persons. Neither a separate agreement nor a provision in the trust suggesting or directing the trustee to retain a specific attorney will obligate the trustee to employ the attorney or obligate the attorney to accept the representation, but if the attorney who is a party to the agreement or who drafted the trust is employed, the compensation paid shall not exceed the compensation provided in the agreement.

(9) Court proceedings to determine compensation, if required, are a part of the trust administration process, and the costs, including fees for the trustee's attorney, shall be determined by the court and paid from the assets of the trust unless the court finds the attorney's fees request to be substantially unreasonable. The court shall direct from which part of the trust they shall be paid.

(10) "Initial trust administration" as used in this section means administration of a trust described in s. 733.707(3) during the period which begins with the death of the settlor and ends upon the final distribution of trust assets outright or to continuing trusts created under the trust agreement, but if an estate tax return is required, not until after issuance of an estate tax closing letter or other evidence of termination of the estate tax proceeding. This initial period is not intended to include continued regular administration of the trust.

(11) This section shall apply to trusts of settlors who die on or after July 1, 1995.

Section 6. Paragraphs (c) and (e) of subsection (4) of section 737.303, Florida Statutes, are amended to read:

737.303 Duty to inform and account to beneficiaries.—The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. The trustee's duty to inform and account includes, but is not limited to, the following:

(4)

(c) In the case of a trust described in s. 733.707(3), the trustee's duties under paragraph (a) extend only to the grantor ~~or beneficiary~~ or the legal representative of the grantor ~~or beneficiary~~ during the grantor's lifetime.

(e) All rights provided a beneficiary under this section may be asserted by a legal representative or natural guardian of the beneficiary. Notice under subsection (1) and a statement of accounts under paragraph (a) provided to a representative of the beneficiary as defined in s. 731.303 shall bind the beneficiary and the trustee shall not be required to provide such notice or statement of accounts to any beneficiary who would be bound by an order binding on a representative of the beneficiary under s. 731.303, if such notice or statement of accounts, respectively, is provided to that representative.

Section 7. Section 737.308, Florida Statutes, is amended to read:

737.308 Notice of trust.—

(1) Upon the death of a settlor of a trust described in s. 733.707(3), the trustee must file a notice of trust with the court of the county of the settlor's domicile and the court having jurisdiction of the settlor's estate.

(2) The notice of trust must contain the name of the settlor, the settlor's date of death, the title of the trust, if any, the date of the trust, and the name and address of the trustee.

(3) If the settlor's probate proceeding has been commenced, the clerk must notify the trustee in writing of the date of the commencement of the probate proceeding and the file number.

(4) The clerk shall file and index the notice of trust in the same manner as a caveat, unless there exists a probate proceeding for the settlor's estate in which case the notice of trust must be filed in the probate proceeding and the clerk shall send a copy to the personal representative.

(5) The clerk shall send a copy of any caveat filed regarding the settlor to the trustee, and the Notice of Trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same.

~~(6)~~(5) In any proceeding affecting the expenses of the administration of the 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.

~~(7)~~(6) Any proceeding affecting the expenses of the administration of the estate or any claims described in s. 733.702(1) prior to the trustee filing a notice of trust are binding upon the trustee.

~~(8)~~(7) The trustee's failure to file the notice of trust does not affect the trustee's obligation to pay expenses of administration and enforceable claims as provided in s. 733.607(2).

Section 8. Section 518.112, Florida Statutes, is amended to read:

518.112 Delegation of investment functions.—

(1) A fiduciary may delegate any part or all of the investment functions, with regard to acts constituting investment functions that a prudent investor of comparable skills might delegate under the circumstances, and with regard to all or part of those investment functions, to an investment agent as provided in subsection (3)(2), if the fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent, in establishing the scope and specific terms of any delegation, and in reviewing periodically the agent's actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.

(2)(a) The requirements of subsection (1) notwithstanding, a fiduciary that administers an insurance contract on the life or lives of one or more persons may delegate without any continuing obligation to review the

agent's actions, certain investment functions with respect to any such contract as provided in subsection (3), to any one or more of the following persons as investment agents:

1. The trust's settlor if the trust is one described in s. 733.707(3);
2. Beneficiaries of the trust or estate, regardless of the beneficiary's interest therein, whether vested or contingent;
3. The spouse, ancestor, or descendant of any person described in subparagraphs 1. or 2.;
4. Any person or entity nominated by a majority of the beneficiaries entitled to receive notice under subsection (3)(b); or
5. An investment agent if the fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent and in establishing the scope and specific terms of any delegation.

(b) The delegable investment functions under this subsection include:

1. A determination of whether any insurance contract is or remains a proper investment;
2. A determination of whether or not to exercise any policy option available under such contracts;
3. A determination of whether or not to diversify such contracts relative to one another or to other assets, if any, administered by the fiduciary; or
4. An inquiry about changes in the health or financial condition of the insured or insureds relative to any such contract.

(c) Until the contract matures and the policy proceeds are received, a fiduciary that administers insurance contracts under this subsection is not obligated to diversify nor allocate other assets, if any, relative to such insurance contracts.

(3)(2) A fiduciary may delegate investment functions to an investment agent under subsections (1) or (2) pursuant to subsection (4), if:

(a) The fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent, in establishing the scope and specific terms of any delegation, and in reviewing periodically the agent's actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.

(a)(b) In the case of a guardianship, the fiduciary has obtained court approval.

(b)(c) In the case of a trust or estate, the fiduciary has given written notice, of its intention to begin delegating investment functions under this section, to all the beneficiaries, or their legal representative, eligible to receive income from the trust or distributions from the trust or estate within

30 days of the delegation unless such notice is waived by the eligible beneficiaries entitled to receive such notice. This notice shall thereafter, until or unless the beneficiaries eligible to receive income from the trust or distributions from the estate at the time are notified to the contrary, authorize the trustee or legal representative to delegate investment functions pursuant to this subsection. This discretion to revoke the delegation does not imply under subsection (2) any continuing obligation to review the agent's actions.

1. ~~Notice to beneficiaries eligible to receive distributions income from the trust or distributions from the estate, or their legal representatives at the time of delegation,~~ shall be sufficient notice to all persons who may join the eligible class of beneficiaries in the future.

2. Additionally, as used herein, legal representative includes one described in s. 731.303, without any requirement of a court order, an attorney-in-fact under a durable power of attorney sufficient to grant such authority, a legally appointed guardian, or equivalent under applicable law, any living, natural guardian of a minor child, or a guardian ad litem. In the case of a minor, notice may be sent to a parent or legal guardian of the minor.

3. Written notice shall be:

(a) By any form of mail or by any commercial delivery service, approved for service of process by the chief judge of the judicial circuit in which the trust has its principal place of business at the date of notice, requiring a signed receipt;

(b) As provided by law for service of process; or

(c) By an elisor as may be provided in the Florida Rules of Civil Procedure.

Notice by mail or by approved commercial delivery service is complete on receipt of notice. Proof of notice must be by verified statement of the person mailing or sending notice, and there must be attached thereto the signed receipt or other satisfactory evidence that delivery was effected on the addressee or on the addressee's agent. Proof of notice must be maintained among the trustee's permanent records. In the case of an otherwise incapacitated person, notice may be given to the guardian of such person or to such person's donee under a durable power of attorney that is sufficient to grant such authority.

(4)(3) If all requirements of subsection (3)(2) are satisfied, the fiduciary shall not be responsible otherwise for the investment decisions ~~nor~~ or actions or omissions of the investment agent to which the investment functions are delegated.

(5)(4) The investment agent shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state.

(6)(5) In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary.

~~(6) This section applies to all existing and future fiduciary relationships subject to this section, but only as to acts or omissions occurring after October 1, 1993.~~

Section 9. Section 733.817, Florida Statutes, is amended to read:

(Substantial rewording of section. See s. 733.817, F.S., for present text.)

733.817 Apportionment of estate taxes.—

(1) For purposes of this section:

(a) “Fiduciary” means a person other than the personal representative in possession of property included in the measure of the tax who is liable to the applicable taxing authority for payment of the entire tax to the extent of the value of the property in his possession.

(b) “Governing instrument” means a will, trust agreement, or any other document that controls the transfer of an asset on the occurrence of the event with respect to which the tax is being levied.

(c) “Gross estate” means the gross estate, as determined by the Internal Revenue Code with respect to the federal estate tax and the Florida estate tax, and as such concept is otherwise determined by the estate, inheritance, or death tax laws of the particular state, country, or political subdivision whose tax is being apportioned.

(d) “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. The term “included in the measure of the tax” 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 diminution of the deduction by reason of the charge of any part of the applicable tax to the interest. The term “included in the measure of the tax” does not include 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.

(e) “Internal Revenue Code” means the Internal Revenue Code of 1986, as amended from time to time.

(f) “Net tax” means the net tax payable to the particular state, country, or political subdivision whose tax is being apportioned, after taking into account all credits against the applicable tax except as provided in this section. With respect to the federal estate tax, “net tax” is determined after taking into account all credits against the tax except for the credit for foreign death taxes.

(g) “Nonresiduary devise” means any devise that is not a residuary devise.

(h) “Nonresiduary interest” in connection with a trust means any interest in a trust which is not a residuary interest.

(i) “Recipient” means, with respect to property or an interest in property included in the gross estate, an heir at law in an intestate estate, devisee in a testate estate, beneficiary of a trust, beneficiary of an insurance policy, annuity, or other contractual right, surviving tenant, taker as a result of the exercise or in default of the exercise of a general power of appointment, person who receives or is to receive the property or an interest in the property, or person in possession of the property.

(j) “Residuary devise” has the meaning set forth in s. 731.201(30).

(k) “Residuary interest,” in connection with a trust, means an interest in the assets of a trust which remain after provision for any distribution that is to be satisfied by reference to a specific property or type of property, fund, sum, or statutory amount.

(l) “Revocable trust” means a trust as defined in s. 731.201(33) created by the decedent to the extent that the decedent had at his or her death the power to alter, amend, or revoke the trust either alone or in conjunction with any other person.

(m) “State” means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(n) “Tax” means any estate tax, inheritance tax, generation skipping transfer tax, or other tax levied or assessed under the laws of this or any other state, the United States, any other country, or any political subdivision of the foregoing, as finally determined, which is imposed as a result of the death of the decedent, including, without limitation, the tax assessed pursuant to s. 4980A of the Internal Revenue Code. The term also includes any interest and penalties imposed in addition to the tax. Unless the context indicates otherwise, the term “tax” means each separate tax.

(o) “Temporary interest” means an interest in income or an estate for a specific period of time or for life or for some other period controlled by reference to extrinsic events, whether or not in trust.

(p) “Tentative Florida tax” with respect to any property means the net Florida estate tax that would have been attributable to that property if no tax were payable to any other state in respect of that property.

(q) “Value” means the pecuniary worth of the interest involved as finally determined for purposes of the applicable tax after deducting any debt, expense, or other deduction chargeable to it for which a deduction was allowed in determining the amount of the applicable tax. A lien or other encumbrance is not regarded as chargeable to a particular interest to the extent that it will be paid from other interests. The value of an interest shall not be reduced by reason of the charge against it of any part of the tax.

(2) An interest in homestead property shall be exempt from the apportionment of taxes if such interest passes to a person to whom inures the decedent’s exemption from forced sale under the State Constitution.

(3) The net tax attributable to the interests included in the measure of each tax shall be 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. Notwithstanding the foregoing:

(a) The net tax attributable to interests included in the measure of the tax by reason of s. 2044 of the Internal Revenue Code shall be determined in the manner provided for the federal estate tax in s. 2207A of the Internal Revenue Code, and the amount so determined shall be deducted from the tax to determine the net tax attributable to all remaining interests included in the measure of the tax.

(b) The foreign tax credit allowed with respect to the federal estate tax shall be allocated among the recipients of interests finally charged with the payment of the foreign tax in reduction of any federal estate tax chargeable to the recipients of the foreign interests, whether or not any federal estate tax is attributable to the foreign interests. Any excess of the foreign tax credit shall be applied to reduce proportionately the net amount of federal estate tax chargeable to the remaining recipients of the interests included in the measure of the federal estate tax.

(c) The reduction in the Florida tax on the estate of a Florida resident for tax paid to other states shall be allocated as follows:

1. If the net tax paid to another state is greater than or equal to the tentative Florida tax attributable to the property subject to tax in the other state, none of the Florida tax shall be attributable to that property.

2. If the net tax paid to another state is less than the tentative Florida tax attributable to the property subject to tax in the other state, the net Florida tax attributable to the property subject to tax in the other state shall be the excess of the amount of the tentative Florida tax attributable to the property over the net tax payable to the other state with respect to the property.

3. Any remaining net Florida tax shall be attributable to property included in the measure of the Florida tax exclusive of property subject to tax in other states.

4. The net federal tax attributable to the property subject to tax in the other state shall be determined as if it were located in the state.

(d) The net tax attributable to a temporary interest, if any, shall be regarded as attributable to the principal that supports the temporary interest.

(4)(a) Except as otherwise effectively directed by the governing instrument, if the Internal Revenue Code including, but not limited to, ss. 2032A(c)(5), 2206, 2207, 2207A, 2207B, and 2603 of the Internal Revenue Code applies to apportion federal tax against recipients of certain interests, all net taxes, including taxes levied by the state attributable to each type of interest, shall be apportioned against the recipients of all interests of that type in the proportion that the value of each interest of that type included

in the measure of the tax bears to the total of all interests of that type included in the measure of the tax.

(b) The provisions of this subsection do not affect allocation of the reduction in the Florida tax as provided in this section with respect to estates of Florida residents which are also subject to tax in other states.

(5) Except as provided above or as otherwise directed by the governing instrument, the net tax attributable to each interest shall be apportioned as follows:

(a) For property passing under the decedent's will:

1. The net tax attributable to nonresiduary devises shall be charged to and paid from the residuary estate whether or not all interests in the residuary estate are included in the measure of the tax. If the residuary estate is insufficient to pay the net tax attributable to all nonresiduary devises, the balance of the net tax attributable to nonresiduary devises shall be apportioned among the recipients of the nonresiduary devises in the proportion that the value of each nonresiduary devise included in the measure of the tax bears to the total of all nonresiduary devises included in the measure of the tax.

2. The net tax attributable to residuary devises shall be apportioned among the recipients of the residuary devises included in the measure of tax in the proportion that the value of each residuary devise included in the measure of the tax bears to the total of all residuary devises included in the measure of the tax.

(b) For property passing under the terms of any trust other than a trust created in the decedent's will:

1. The net tax attributable to nonresiduary interests shall be charged to and paid from the residuary portion of the trust, whether or not all interests in the residuary portion are included in the measure of the tax. If the residuary portion of the trust is insufficient to pay the net tax attributable to all nonresiduary interests, the balance of the net tax attributable to nonresiduary interests shall be apportioned among the recipients of the nonresiduary interests in the proportion that the value of each nonresiduary interest included in the measure of the tax bears to the total of all nonresiduary interests included in the measure of the tax.

2. The net tax attributable to residuary interests shall be apportioned among the recipients of the residuary interests included in the measure of the tax in the proportion that the value of each residuary interest included in the measure of the tax bears to the total of all residuary interests included in the measure of the tax.

(c) The net tax attributable to an interest in homestead property which is exempt from apportionment pursuant to subsection (2) shall be apportioned against the recipients of other interests in the estate or passing under any revocable trust in the following order:

1. Class I: Recipients of interests not disposed of by the decedent's will or revocable trust which are included in the measure of the federal estate tax.

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

3. Class III: Recipients of nonresiduary devises and nonresiduary interests that are included in the measure of the federal estate tax. The net tax apportioned to a class, if any, pursuant to this paragraph shall be apportioned among the recipients in the class in the proportion that the value of the interest of each bears to the total value of all interests included in that class.

(d) In the application of this subsection, paragraphs (a), (b), and (c) shall be applied to apportion the net tax to the recipients of the estate and the recipients of the decedent's revocable trust as if all recipients, other than the estate or trusts themselves, were taking under a common instrument.

(e) The net tax imposed under s. 4980A of the Internal Revenue Code shall be apportioned among the recipients of the interests included in the measure of that tax in the proportion that the value of the interest of each bears to the total value of all interests included in the measure of that tax.

(f) The net tax that is not apportioned under paragraphs (a), (b), and (c), including, but not limited to, the net tax attributable to interests passing by intestacy, jointly held interests passing by survivorship, insurance, properties in which the decedent held a reversionary or revocable interest, and annuities, shall be apportioned among the recipients of the remaining interests that are included in the measure of the tax in the proportion that the value of each such interest bears to the total value of all the remaining interests included in the measure of the tax.

(g) If the court finds that it is inequitable to apportion interest, penalties, or both, in the manner provided in paragraphs (a)-(f), the court may assess liability for the payment thereof in the manner it finds equitable.

(h)1. To be effective as a direction for payment of tax in a manner different from that provided in this section, the governing instrument must direct that the tax be paid from assets that pass pursuant to that governing instrument, except as provided in this section.

2. If the decedent's will provides that the tax shall be apportioned as provided in the decedent's revocable trust by specific reference to the trust, the direction in the revocable trust shall be deemed to be a direction contained in the will and shall control with respect to payment of taxes from assets passing under both the will and the revocable trust.

3. A direction in the decedent's will to pay tax from the decedent's revocable trust is effective if a contrary direction is not contained in the trust agreement.

4. 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 this section, 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 shall be effective to direct the payment from property passing under the governing instrument of taxes attributable to property not passing under the governing instrument.

5. 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 as follows:

a. The governing instrument shall be given effect with respect to any tax remaining unpaid after the application of the decedent's will.

b. 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 shall be 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.

(6) The personal representative or fiduciary shall not be required to transfer to a recipient any property in possession of the personal representative or fiduciary which he or she reasonably anticipates may be necessary for the payment of taxes. Further, the personal representative or fiduciary shall not be required to transfer any property in possession of the personal representative or fiduciary to the recipient until the amount of the tax due from the recipient is paid by the recipient. If property is transferred before final apportionment of the tax, the recipient shall provide a bond or other security for his apportioned liability in the amount and form prescribed by the personal representative or fiduciary.

(7)(a) The personal representative may petition at any time for an order of apportionment. If no administration has been commenced at any time after 90 days from the decedent's death any fiduciary may petition for an order of apportionment in the court in which venue would be proper for administration of the decedent's estate. Formal notice of the petition for order of apportionment shall be given to all interested persons. At any time after 6 months from the decedent's death, any recipient may petition such court for an order of apportionment.

(b) The court shall determine all issues concerning apportionment. If the tax to be apportioned has not been finally determined, the court shall determine the probable tax due or to become due from all interested persons, apportion the probable tax, and retain jurisdiction over the parties and issues to modify the order of apportionment as appropriate until after the tax is finally determined.

(8)(a) If the personal representative or fiduciary does not have possession of sufficient property otherwise distributable to the recipient to pay the tax

apportioned to the recipient, whether under this section, the Internal Revenue Code, or the governing instrument, if applicable, the personal representative or fiduciary shall recover the deficiency in tax so apportioned to the recipient:

1. From the fiduciary in possession of the property to which the tax is apportioned, if any; and

2. To the extent of any deficiency in collection from the fiduciary, or to the extent collection from the fiduciary is excused pursuant to subsection (9) and in all other cases, from the recipient of the property to which the tax is apportioned, unless relieved of this duty as provided in subsection (9).

(b) In any action to recover the tax apportioned, the order of apportionment shall be prima facie correct.

(c) In any action for the enforcement of an order of apportionment, the court shall award taxable costs as in chancery actions, including reasonable attorney's fees, and may award penalties and interest on the unpaid tax in accordance with equitable principles.

(d) This subsection shall not authorize the recovery of any tax from any company issuing insurance included in the gross estate, or from any bank, trust company, savings and loan association, or similar institution with respect to any account in the name of the decedent and any other person which passed by operation of law on the decedent's death.

(9)(a) A personal representative or fiduciary who has the duty under this section of collecting the apportioned tax from recipients may be relieved of the duty to collect the tax by an order of the court finding:

1. That the estimated court costs and attorney's fees in collecting the apportioned tax from a person against whom the tax has been apportioned will approximate or exceed the amount of the recovery;

2. That the person against whom the tax has been apportioned is a resident of a foreign country other than Canada and refuses to pay the apportioned tax on demand; or

3. That it is impracticable to enforce contribution of the apportioned tax against a person against whom the tax has been apportioned in view of the improbability of obtaining a judgment or the improbability of collection under any judgment that might be obtained, or otherwise.

(b) A personal representative or fiduciary shall not be liable for failure to attempt to enforce collection if the personal representative or fiduciary reasonably believes it would have been economically impracticable.

(10) Any apportioned tax that is not collected shall be reapportioned in accordance with this section as if the portion of the property to which the uncollected tax had been apportioned had been exempt.

(11) Nothing in this section shall limit the right of any person who has paid more than the amount of the tax apportionable to such person, calcu-

lated as if all apportioned amounts would be collected, to obtain contribution from those who have not paid the full amount of the tax apportionable to them, calculated as if all apportioned amounts would be collected, and that right is hereby conferred. In any action to enforce contribution, the court shall award taxable costs as in chancery actions, including reasonable attorney's fees.

(12) Nothing herein contained shall be construed to require the personal representative or fiduciary to pay any tax levied or assessed by any foreign country, unless specific directions to that effect are contained in the will or other instrument under which the personal representative or fiduciary is acting.

Section 10. Section 738.12, Florida Statutes, is amended to read:

738.12 Underproductive property.—

(1)(a) If the total principal of a trust does not in any year yield a net income of at least 3 percent of its market value (including as income the value of any beneficial use of the property by the income beneficiary), the trustee shall pay to the income beneficiary an amount equal to the excess of 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year, over the trust income paid to the income beneficiary in that year. This amount shall be paid to the income beneficiary using the first principal cash available.

(b) In the event of a termination or initiation of a trust, or the termination of a beneficial income interest of a trust, for a period of less than 12 months, the amount to be paid to the income beneficiary shall be prorated proportionately with the length of the time of his interest in the trust and in accordance with s. 738.03.

(c) For purposes of this subsection, a beneficiary is considered to be an income beneficiary only if the trust instrument is irrevocable and requires that the net income from the trust be paid to the beneficiary. Payment under this subsection may not be made to a beneficiary who may receive trust income only in the discretion of the trustee.

(2) Upon the sale of the property the income beneficiary shall not be entitled to any portion of the proceeds of sale, except that any amount determined in subsection (1) that remains unpaid at the time of sale shall be paid therefrom.

~~(3) If by the terms of the trust any portion of the income is to be retained by the trustee or disposed of other than by payment to an income beneficiary, such portion of the amount determined in subsection (1) shall be retained or disposed of as provided by the terms of the trust.~~

Section 11. Subsection (16) of section 744.441, Florida Statutes, is amended to read:

744.441 Powers of guardian upon court approval.—After obtaining approval of the court pursuant to a petition for authorization to act, a plenary

guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(16) Pay reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate, up to a maximum of \$6,000 ~~\$3,000~~.

Section 12. Subsection (4) is added to section 655.936, Florida Statutes, to read:

655.936 Delivery of safe-deposit box contents or property held in safe-keeping to personal representative.—

(4) Notwithstanding other provisions of this section, the initial opening of any safe-deposit box of the decedent must be conducted in the presence of an employee of the institution where the box is located and the personal representative. The inventory of the contents of the box also must be conducted in the presence of the employee and the personal representative, each of whom must verify the contents of the box by signing a copy of the inventory. The personal representative shall file the safe-deposit box inventory with the court within 10 days after the box is opened.

Section 13. Subsection (1) of section 733.604, Florida Statutes, is amended to read:

733.604 Inventory.—

(1)(a) Within 60 days after issuance of letters, a personal representative who is not a curator or a successor to another personal representative who has previously discharged the duty shall file an inventory of property of the estate, listing it with reasonable detail and including for each listed item its estimated fair market value at the date of the decedent's death. Unless otherwise ordered by the court for good cause shown, any such inventory or amended or supplementary inventory is subject to inspection only by the clerk of the court or his representative, the personal representative and his attorney, and other interested persons.

(b) The initial opening of any safe-deposit box of the decedent must be conducted in the presence of an employee of the institution where the box is located and the personal representative. The inventory of the contents of the box also must be conducted in the presence of the employee and the personal representative, each of whom must verify the contents of the box by signing a copy of the inventory. The personal representative shall file the safe-deposit box inventory with the court within 10 days after the box is opened.

Section 14. This act shall take effect upon becoming a law, except that section 9 of this act shall take effect October 1, 1998, and shall apply to the estates of decedents dying on or after October 1, 1998, and section 10 of this act shall take effect upon becoming law and shall be applicable to all trusts, whenever executed.

Became a law without the Governor's approval May 30, 1997.

Filed in Office Secretary of State May 29, 1997.