

CHAPTER 2010-122

Committee Substitute for Committee Substitute for Senate Bill No. 998

An act relating to trust administration; amending s. 733.607, F.S.; limiting a personal representative's entitlement to payment from a trust of certain estate expenses and obligations; specifying application of certain criteria in making certain payments from a trust; amending s. 733.707, F.S.; specifying application of additional provisions to liability for certain estate expense and obligation payments from a trust; amending s. 736.0206, F.S.; deleting certain notice requirements relating to court review of a trustee's employment of certain persons; authorizing the award of expert witness fees from trust assets rather than requiring the award of such fees; providing a limitation; creating s. 736.04114, F.S.; providing for interpretation of trusts not subject to the federal estate tax; providing conditions; providing definitions; providing criteria for a court interpreting a trust; providing an exception; allowing a trustee to take certain actions pending a determination of trust distribution; limiting trustee liability; providing for interpretation; providing for retroactive effect; amending s. 736.0505, F.S.; revising a value criterion for determining the extent of treating the holder of a power of withdrawal as the settlor of a trust; providing criteria for determining who contributed certain trust assets under certain circumstances; amending s. 736.05053, F.S.; requiring application of priorities for pro rata abatement of nonresiduary trust dispositions together with nonresiduary devises; amending s. 736.1007, F.S.; deleting authority for a court to determine an attorney's compensation; deleting certain expert testimony and fee payment provisions; deleting requirements for certain court compensation determination proceedings to be part of a trust administration process and for court determination and payment of certain estate costs and fees from trust assets; creating s. 736.1211, F.S.; prohibiting state agencies and local governments from requiring the disclosure of certain characteristics of persons associated with certain charitable organizations, trusts, and foundations; prohibiting state agencies and local governments from requiring certain private foundations or trusts to disclose certain characteristics of persons associated with an entity receiving monetary or in-kind contributions from the foundation or trust; prohibiting state agencies and local governments from requiring that individuals having certain characteristics be included on the governing board or as officers of certain charitable organizations, trusts, or foundations; prohibiting state agencies and local governments from prohibiting a person from serving on the board or as an officer based on the person's familial relationship to other board members, officers, or a donor; prohibiting state agencies and local governments from requiring that certain charitable organizations, trusts, or foundations distribute funds to or contract with persons or entities having certain characteristics; specifying the effect of the act on contracts in existence before the effective date of the act; providing effective dates.

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

Section 1. Subsection (2) of section 733.607, Florida Statutes, is amended to read:

733.607 Possession of estate.—

(2) If, after providing for statutory entitlements and all devises other than residuary devises, the assets of the decedent's estate are insufficient to pay the expenses of the administration and obligations of the decedent's estate, the personal representative is entitled to payment from the trustee of a trust described in s. 733.707(3), in the amount the personal representative certifies in writing to be required to satisfy the insufficiency, subject to the exclusions and preferences under s. 736.05053. The provisions of s. 733.805 shall apply in determining the amount of any payment required by this section.

Section 2. Subsection (3) of section 733.707, Florida Statutes, is amended to read:

733.707 Order of payment of expenses and obligations.—

(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), either alone or in conjunction with any other person, is liable for the expenses of the administration and obligations of the decedent's estate to the extent the decedent's estate is insufficient to pay them as provided in ss. s. 733.607(2) and 736.05053.

(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 to 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 3. Subsections (1), (5), (6), and (7) of section 736.0206, Florida Statutes, are amended to read:

736.0206 Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.—

~~(1) After notice to all interested persons,~~ The court may review the propriety of the employment by a trustee of any person, including any attorney, auditor, investment adviser, or other specialized agent or assistant, and the reasonableness of any compensation paid to that person or to the trustee.

(5) The court may determine reasonable compensation for a trustee or any person employed by a trustee without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, a reasonable expert witness fee may shall be awarded by the court and paid from the assets of the trust unless the court finds that the expert testimony did not assist the court. The court shall direct from which part of the trust assets the fee shall be paid.

~~(6) Persons given notice as provided in this section shall be bound by all orders entered on the complaint.~~

~~(6)(7)~~ In a proceeding pursuant to subsection (2), the petitioner may serve formal notice as provided in the Florida Probate Rules, and such notice shall be sufficient for the court to acquire jurisdiction over the person receiving the notice to the extent of the person's interest in the trust.

Section 4. Effective upon this act becoming a law, section 736.04114, Florida Statutes, is created to read:

736.04114 Limited judicial construction of irrevocable trust with federal tax provisions.—

(1) Upon the application of a trustee or any qualified beneficiary of a trust, a court at any time may construe the terms of a trust that is not then revocable to define the respective shares or determine beneficiaries, in accordance with the intention of the settlor, if a disposition occurs during the applicable period and the trust contains a provision that:

(a) Includes a formula disposition referring to the “unified credit,” “estate tax exemption,” “applicable exemption amount,” “applicable credit amount,” “applicable exclusion amount,” “generation-skipping transfer tax exemption,” “GST exemption,” “marital deduction,” “maximum marital deduction,” “unlimited marital deduction,” or “maximum charitable deduction”;

(b) Measures a share of a trust based on the amount that can pass free of federal estate tax or the amount that can pass free of federal generation-skipping transfer tax;

(c) Otherwise makes a disposition referring to a charitable deduction, marital deduction, or another provision of federal estate tax or generation-skipping transfer tax law; or

(d) Appears to be intended to reduce or minimize federal estate tax or generation-skipping transfer tax.

(2) For the purpose of this section:

(a) “Applicable period” means a period beginning January 1, 2010, and ending on the end of the day on the earlier of:

1. December 31, 2010; or

2. The day before the date that an act becomes law which repeals or otherwise modifies or has the effect of repealing or modifying s. 901 of The Economic Growth and Tax Relief Reconciliation Act of 2001.

(b) A “disposition occurs” when an interest takes effect in possession or enjoyment.

(3) In construing the trust, the court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and the settlor’s probable intent. In determining the settlor’s probable intent, the court may consider evidence relevant to the settlor’s intent even though the evidence contradicts an apparent plain meaning of the trust instrument.

(4) This section does not apply to a disposition that is specifically conditioned upon no federal estate or generation-skipping transfer tax being imposed.

(5) Unless otherwise ordered by the court, during the applicable period and without court order, the trustee administering a trust containing one or more provisions described in subsection (1) may:

(a) Delay or refrain from making any distribution;

(b) Incur and pay fees and costs reasonably necessary to determine its duties and obligations, including compliance with provisions of existing and reasonably anticipated future federal tax laws; and

(c) Establish and maintain reserves for the payment of these fees and costs and federal taxes.

The trustee is not liable for its actions as provided in this subsection which are made or taken in good faith.

(6) The provisions of this section are in addition to, and not in derogation of, rights under this code or the common law to construe a trust.

(7) This section is remedial in order to provide a new or modified legal remedy. This section applies retroactively and is effective as of January 1, 2010.

Section 5. Paragraph (b) of subsection (2) of section 736.0505, Florida Statutes, is amended, and subsection (3) is added to that section, to read:

736.0505 Creditors' claims against settlor.—

(2) For purposes of this section:

(b) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in:

1. Section 2041(b)(2) or s. 2514(e); or

2. Section 2503(b) and, if the donor was married at the time of the transfer to which the power of withdrawal applies, twice the amount specified in s. 2503(b),

of the Internal Revenue Code of 1986, as amended.

(3) Subject to the provisions of s. 726.105, for purposes of this section, the assets in:

(a) A trust described in s. 2523(e) of the Internal Revenue Code of 1986, as amended, or a trust for which the election described in s. 2523(f) of the Internal Revenue Code of 1986, as amended, has been made; and

(b) Another trust, to the extent that the assets in the other trust are attributable to a trust described in paragraph (a),

shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor.

Section 6. Subsection (5) is added to section 736.05053, Florida Statutes, to read:

736.05053 Trustee's duty to pay expenses and obligations of settlor's estate.—

(5) Nonresiduary trust dispositions shall abate pro rata with nonresiduary devises pursuant to the priorities specified in this section and s. 733.805, determined as if the beneficiaries of the will and trust, other than the estate or trust itself, were taking under a common instrument.

Section 7. Subsections (7) through (10) of section 736.1007, Florida Statutes, are amended to read:

736.1007 Trustee's attorney's fees.—

~~(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 shall direct from what part of the trust the fee is to be paid.~~

~~(7)(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. A separate agreement or a provision in the trust suggesting or directing the trustee to retain a specific attorney does not 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 what part of the trust the fees are to be paid.~~

~~(8)(10)~~ As used in this section, the term "initial trust administration" means administration of a revocable trust during the period that begins with the death of the settlor and ends on 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.

Section 8. Section 736.1211, Florida Statutes, is created to read:

736.1211 Protections afforded to certain charitable trusts and organizations.—

(1) A charitable organization, private foundation trust, split interest trust, or a private foundation as defined in s. 509(a) of the Internal Revenue Code may not be required by a state agency or a local government to disclose

the race, religion, gender, national origin, socioeconomic status, age, ethnicity, disability, marital status, sexual orientation, or political party registration of its employees, officers, directors, trustees, members, or owners, without the prior written consent of the individual or individuals in question.

(2) A private foundation as defined in s. 509(a) of the Internal Revenue Code, a private foundation trust, a split interest trust, or a grant-making organization may not be required by the state or any local government to disclose the race, religion, gender, national origin, socioeconomic status, age, ethnicity, disability, marital status, sexual orientation, or political party registration of any person, or of the employees, officers, directors, trustees, members, or owners of any entity that has received monetary or in-kind contributions from or contracted with the organization, trust, or foundation, without the prior written consent of the individual or individuals in question. For purposes of this subsection, a “grant-making organization” is an organization that makes grants to charitable organizations but is not a private foundation, private foundation trust, or split interest trust.

(3) A state agency or a local government may not require that the governing board or officers of a charitable organization, private foundation trust, split interest trust, or a private foundation as defined in s. 509(a) of the Internal Revenue Code include an individual or individuals of any particular race, religion, gender, national origin, socioeconomic status, age, ethnicity, disability, marital status, sexual orientation, or political party registration. Further, a state agency or a local government may not prohibit service as a board member or officer by an individual or individuals based upon their familial relationship to each other or to a donor or require that the governing board or officers include one or more individuals who do not share a familial relationship with each other or with a donor.

(4) A charitable organization, private foundation trust, split interest trust, or any private foundation as defined in s. 509(a) of the Internal Revenue Code may not be required by a state agency or a local government to distribute its funds to or contract with any person or entity based upon the race, religion, gender, national origin, socioeconomic status, age, ethnicity, disability, marital status, sexual orientation, or political party registration of the person or of the employees, officers, directors, trustees, members, or owners of the entity, or based upon the populations, locales, or communities served by the person or entity, except as a lawful condition on the expenditure of particular funds imposed by the donor of such funds.

Section 9. Section 8 of this act does not invalidate contracts in effect before the effective date of this act.

Section 10. Except as otherwise expressly provided in this act and except for this section, which shall take effect upon this act becoming a law, this act shall take effect July 1, 2010.

Approved by the Governor May 27, 2010.

Filed in Office Secretary of State May 27, 2010.