

CHAPTER 2011-183

Committee Substitute for House Bill No. 325

An act relating to estates; creating s. 90.5021, F.S.; providing a fiduciary lawyer-client privilege; providing that the section is inapplicable to a specified crime or fraud exception to lawyer-client privilege; amending s. 732.102, F.S.; revising provisions relating to the intestate share of a surviving spouse; creating s. 732.615, F.S.; providing a right to reform the terms of a will to correct mistakes; creating s. 732.616, F.S.; providing a right to modify the terms of a will to achieve tax objectives; creating s. 733.1061, F.S.; providing for a court to award fees and costs in reformation and modification proceedings either against a party's share in the estate or in the form of a personal judgment against a party individually; amending s. 732.5165, F.S.; clarifying that a revocation of a will is subject to challenge on the grounds of fraud, duress, mistake, or undue influence; amending s. 732.518, F.S.; specifying that a challenge to the revocation of a will may not be commenced before the testator's death; amending s. 733.212, F.S.; providing for notice of fiduciary lawyer-client privilege in a notice of administration; amending s. 736.0207, F.S.; clarifying when a challenge to the revocation of a revocable trust may be brought; amending s. 736.0406, F.S.; providing that the creation of a trust amendment or trust restatement and the revocation of a trust are subject to challenge on the grounds of fraud, duress, mistake, or undue influence; amending s. 736.0813, F.S.; providing for notice of fiduciary lawyer-client privilege by a trustee; amending s. 744.441, F.S.; limiting the circumstances under which a guardian of an incapacitated person may bring a challenge to a settlor's revocation of a revocable trust; amending s. 736.0201, F.S.; clarifying that certain payments by a trustee from trust assets are not taxation of attorney's fees and costs subject to a specified Rule of Civil Procedure; providing effective dates.

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

Section 1. Section 90.5021, Florida Statutes, is created to read:

90.5021 Fiduciary lawyer-client privilege.—

(1) For the purpose of this section, a client acts as a fiduciary when serving as a personal representative or a trustee as defined in ss. 731.201 and 736.0103, an administrator ad litem as described in s. 733.308, a curator as described in s. 733.501, a guardian or guardian ad litem as defined in s. 744.102, a conservator as defined in s. 710.102, or an attorney in fact as described in chapter 709.

(2) A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying s. 90.502 to a

communication under this section, only the person or entity acting as a fiduciary is considered a client of the lawyer.

(3) This section does not affect the crime or fraud exception to the lawyer-client privilege provided in s. 90.502(4)(a).

Section 2. Effective October 1, 2011, subsections (2) and (3) of section 732.102, Florida Statutes, are amended, and subsection (4) is added to that section, to read:

732.102 Spouse's share of intestate estate.—The intestate share of the surviving spouse is:

(2) If the decedent is survived by one or more descendants there are surviving descendants of the decedent, all of whom are also lineal descendants of the surviving spouse, and the surviving spouse has no other descendant, the entire intestate estate the first \$60,000 of the intestate estate, plus one-half of the balance of the intestate estate. Property allocated to the surviving spouse to satisfy the \$60,000 shall be valued at the fair market value on the date of distribution.

(3) If there are one or more surviving descendants of the decedent who, one or more of whom are not lineal descendants of the surviving spouse, one-half of the intestate estate.

(4) If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent, one-half of the intestate estate.

Section 3. Effective July 1, 2011, section 732.615, Florida Statutes, is created to read:

732.615 Reformation to correct mistakes.—Upon application of any interested person, the court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. In determining the testator's original intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will.

Section 4. Effective July 1, 2011, section 732.616, Florida Statutes, is created to read:

732.616 Modification to achieve testator's tax objectives.—Upon application of any interested person, to achieve the testator's tax objectives the court may modify the terms of a will in a manner that is not contrary to the testator's probable intent. The court may provide that the modification has retroactive effect.

Section 5. Effective July 1, 2011, section 733.1061, Florida Statutes, is created to read:

733.1061 Fees and costs; will reformation and modification.—

(1) In a proceeding arising under s. 732.615 or s. 732.616, the court shall award taxable costs as in chancery actions, including attorney’s fees and guardian ad litem fees.

(2) When awarding taxable costs, including attorney’s fees and guardian ad litem fees, under this section, the court in its discretion may direct payment from a party’s interest, if any, in the estate or enter a judgment which may be satisfied from other property of the party, or both.

Section 6. Section 732.5165, Florida Statutes, is amended to read:

732.5165 Effect of fraud, duress, mistake, and undue influence.—A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons. If the revocation of a will, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.

Section 7. Section 732.518, Florida Statutes, is amended to read:

732.518 Will contests.—An action to contest the validity of all or part of a will or the revocation of all or part of a will may not be commenced before the death of the testator.

Section 8. Paragraph (b) of subsection (2) of section 733.212, Florida Statutes, is amended to read:

733.212 Notice of administration; filing of objections.—

(2) The notice shall state:

(b) The name and address of the personal representative and the name and address of the personal representative’s attorney, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the personal representative and any attorney employed by the personal representative.

Section 9. Section 736.0207, Florida Statutes, is amended to read:

736.0207 Trust contests.—An action to contest the validity of all or part of a revocable trust, or the revocation of part of a revocable trust, may not be commenced until the trust becomes irrevocable by its terms or by the settlor’s death. If all of a revocable trust has been revoked, an action to contest the revocation may not be commenced until after the settlor’s death.,-except This section does not prohibit such action by the guardian of the property of an incapacitated settlor.

Section 10. Section 736.0406, Florida Statutes, is amended to read:

736.0406 Effect of fraud, duress, mistake, or undue influence.—~~A trust is void if the creation, amendment, or restatement of a the trust is procured by fraud, duress, mistake, or undue influence, the trust or any part so procured of the trust is void, if procured by such means, but~~ The remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons. If the revocation of a trust, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.

Section 11. Paragraphs (a) and (b) of subsection (1) of section 736.0813, Florida Statutes, are amended to read:

736.0813 Duty to inform and account.—The trustee shall keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration.

(1) The trustee's duty to inform and account includes, but is not limited to, the following:

(a) Within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust, ~~and the full name and address of the trustee, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.~~

(b) Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee shall give notice to the qualified beneficiaries of the trust's existence, the identity of the settlor or settlors, the right to request a copy of the trust instrument, ~~and the right to accountings under this section, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.~~

Paragraphs (a) and (b) do not apply to an irrevocable trust created before the effective date of this code, or to a revocable trust that becomes irrevocable before the effective date of this code. Paragraph (a) does not apply to a trustee who accepts a trusteeship before the effective date of this code.

Section 12. Subsection (11) 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:

(11) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties. Before authorizing a guardian to bring an action described in s. 736.0207, the court shall first find that the action appears to be in the ward's

best interests during the ward's probable lifetime. There shall be a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interests if the revocation relates solely to a devise. This subsection does not preclude a challenge after the ward's death. If the court denies a request that a guardian be authorized to bring an action described in s. 736.0207, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

Section 13. Subsection (1) of section 736.0201, Florida Statutes, is amended, and subsection (6) is added to that section, to read:

736.0201 Role of court in trust proceedings.—

(1) Except as provided in subsections ~~subsection~~ (5) and (6) and s. 736.0206, judicial proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure.

(6) Rule 1.525, Florida Rules of Civil Procedure, shall apply to judicial proceedings concerning trusts, except that the following do not constitute taxation of costs or attorney's fees even if the payment is for services rendered or costs incurred in a judicial proceeding:

(a) A trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust.

(b) A determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made under s. 736.1004 in an action for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers.

Section 14. Except as otherwise expressly provided in this act, this act shall take effect upon becoming a law and shall apply to all proceedings pending before such date and all cases commenced on or after the effective date.

Approved by the Governor June 21, 2011.

Filed in Office Secretary of State June 21, 2011.