

CHAPTER 2016-189

Committee Substitute for Committee Substitute for Committee Substitute for Senate Bill No. 540

An act relating to estates; creating s. 731.1055, F.S.; providing that the validity and the effect of a specified disposition of real property be determined by Florida law; amending s. 731.106, F.S.; conforming provisions to changes made by the act; amending s. 732.201, F.S.; revising the right to elective share for a surviving spouse; providing legislative intent; amending s. 736.0802, F.S.; defining the term “pleading”; authorizing a trustee to pay attorney fees and costs from the assets of the trust without specified approval or court authorization in certain circumstances; requiring the trustee to serve a written notice of intent upon each qualified beneficiary of the trust before the payment is made; requiring the notice of intent to contain specified information and to be served in a specified manner; providing that specified qualified beneficiaries may be entitled to an order compelling the refund of a specified payment to the trust; requiring the court to award specified attorney fees and costs in certain circumstances; authorizing the court to prohibit a trustee from using trust assets to make a specified payment; authorizing the court to enter an order compelling the return of specified attorney fees and costs to the trust with interest at the statutory rate; requiring the court to deny a specified motion unless the court finds a reasonable basis to conclude that there has been a breach of the trust; authorizing a court to deny the motion if it finds good cause to do so; authorizing the movant to show that a reasonable basis exists, and a trustee to rebut the showing, through specified means; authorizing the court to impose such remedies or sanctions as it deems appropriate; providing that a trustee is authorized to use trust assets in a specified manner if a claim or defense of breach of trust is withdrawn, dismissed, or judicially resolved in a trial court without a determination that the trustee has committed a breach of trust; providing that specified proceedings, remedies, and rights are not limited; amending ss. 736.0816 and 736.1007, F.S.; conforming provisions to changes made by the act; providing an effective date.

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

Section 1. Section 731.1055, Florida Statutes, is created to read:

731.1055 Disposition of real property.—The validity and effect of a disposition, whether intestate or testate, of real property in this state shall be determined by Florida law.

Section 2. Subsection (2) of section 731.106, Florida Statutes, is amended to read:

731.106 Assets of nondomiciliaries.—

(2) When a nonresident decedent, whether or not a citizen of the United States, provides by will that the testamentary disposition of tangible or intangible personal property having a situs within this state, ~~or of real property in this state,~~ shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law. The court may, and in the case of a decedent who was at the time of death a resident of a foreign country the court shall, direct the personal representative appointed in this state to make distribution directly to those designated by the decedent's will as beneficiaries of the tangible or intangible property or to the persons entitled to receive the decedent's personal estate under the laws of the decedent's domicile.

Section 3. Section 732.201, Florida Statutes, is amended to read:

732.201 Right to elective share.—The surviving spouse of a person who dies domiciled in Florida has the right to a share of the elective estate of the decedent as provided in this part, to be designated the elective share. The election does not reduce what the spouse receives if the election were not made and the spouse is not treated as having predeceased the decedent.

Section 4. It is the intent of the Legislature that the amendment to s. 732.201, Florida Statutes, made by this act is to clarify existing law.

Section 5. Subsection (10) of section 736.0802, Florida Statutes, is amended to read:

736.0802 Duty of loyalty.—

(10) ~~Unless otherwise provided in this subsection, payment of costs or attorney attorney's fees incurred in any proceeding from the assets of the trust may be made by a the trustee from assets of the trust without the approval of any person and without court authorization, unless the court orders otherwise as provided in ss. 736.0816(20) and 736.1007(1) paragraph (b).~~

(a) As used in this subsection, the term "pleading" means a pleading as defined in Rule 1.100 of the Florida Rules of Civil Procedure.

(b) If a trustee incurs attorney fees or costs in connection with a claim or defense of breach of trust which is made in a filed pleading, the trustee may pay such attorney fees or costs from trust assets without the approval of any person and without any court authorization. However, the trustee must serve a written notice of intent upon each qualified beneficiary of the trust whose share of the trust may be affected by the payment before such payment is made. The notice of intent does not need to be served upon a qualified beneficiary whose identity or location is unknown to, and not reasonably ascertainable by, the trustee.

(c) The notice of intent must identify the judicial proceeding in which the claim or defense of breach of trust has been made in a filed pleading and must inform the person served of his or her right under paragraph (e) to

apply to the court for an order prohibiting the trustee from using trust assets to pay attorney fees or costs as provided in paragraph (b) or compelling the return of such attorney fees and costs to the trust. The notice of intent must be served by any commercial delivery service or form of mail requiring a signed receipt; the manner provided in the Florida Rules of Civil Procedure for service of process; or, as to any party over whom the court has already acquired jurisdiction in that judicial proceeding, in the manner provided for service of pleadings and other documents by the Florida Rules of Civil Procedure.

(d) If a trustee has used trust assets to pay attorney fees or costs described in paragraph (b) before service of a notice of intent, any qualified beneficiary who is not barred under s. 736.1008 and whose share of the trust may have been affected by such payment is entitled, upon the filing of a motion to compel the return of such payment to the trust, to an order compelling the return of such payment, with interest at the statutory rate. The court shall award attorney fees and costs incurred in connection with the motion to compel as provided in s. 736.1004.

(e) Upon the motion of any qualified beneficiary who is not barred under s. 736.1008 and whose share of the trust may be affected by the use of trust assets to pay attorney fees or costs as provided in paragraph (b), the court may prohibit the trustee from using trust assets to make such payment and, if such payment has been made from trust assets after service of a notice of intent, the court may enter an order compelling the return of the attorney fees and costs to the trust, with interest at the statutory rate. In connection with any hearing on a motion brought under this paragraph:

1. The court shall deny the motion unless it finds a reasonable basis to conclude that there has been a breach of trust. If the court finds there is a reasonable basis to conclude there has been a breach of trust, the court may still deny the motion if it finds good cause to do so.

2. The movant may show that such reasonable basis exists, and the trustee may rebut any such showing by presenting affidavits, answers to interrogatories, admissions, depositions, and any evidence otherwise admissible under the Florida Evidence Code.

(f) If a trustee fails to comply with an order of the court prohibiting the use of trust assets to pay attorney fees or costs described in paragraph (b) or fails to comply with an order compelling that such payment be refunded to the trust, the court may impose such remedies or sanctions as the court deems appropriate, including, without limitation, striking the defenses or pleadings filed by the trustee.

(g) Notwithstanding the entry of an order prohibiting the use of trust assets to pay attorney fees and costs as provided in paragraph (b), or compelling the return of such attorney fees or costs, if a claim or defense of breach of trust is withdrawn, dismissed, or judicially resolved in the trial court without a determination that the trustee has committed a breach of

trust, the trustee is authorized to use trust assets to pay attorney fees and costs as provided in paragraph (b) and may do so without service of a notice of intent or order of the court. The attorney fees and costs may include fees and costs that were refunded to the trust pursuant to an order of the court.

(h) This subsection does not limit proceedings under s. 736.0206 or remedies for breach of trust under s. 736.1001, or the right of any interested person to challenge or object to the payment of compensation or costs from the trust.

~~(a) If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee shall provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the intention to pay costs or attorney's fees incurred in the proceeding from the trust prior to making payment. The written notice shall be delivered by sending a copy by any commercial delivery service requiring a signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules of Civil Procedure for service of process. The written notice shall inform each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the right to apply to the court for an order prohibiting the trustee from paying attorney's fees or costs from trust assets. If a trustee is served with a motion for an order prohibiting the trustee from paying attorney's fees or costs in the proceeding and the trustee pays attorney's fees or costs before an order is entered on the motion, the trustee and the trustee's attorneys who have been paid attorney's fees or costs from trust assets to defend against the claim or defense are subject to the remedies in paragraphs (b) and (c).~~

~~(b) If a claim or defense based upon breach of trust is made against a trustee in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from trust assets. To obtain an order prohibiting payment of costs or attorney's fees from trust assets, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court in its discretion may defer ruling on the motion, pending discovery to be taken by the parties. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order attorney's fees or costs previously paid from assets of the trust to be refunded. An order entered under this paragraph shall not limit a trustee's right to seek an order permitting the payment of some or all of the attorney's fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney's fees and~~

costs pursuant to this paragraph, the trustee may pay costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization.

~~(c) If the court orders a refund under paragraph (b), the court may enter such sanctions as are appropriate if a refund is not made as directed by the court, including, but not limited to, striking defenses or pleadings filed by the trustee. Nothing in this subsection limits other remedies and sanctions the court may employ for the failure to refund timely.~~

~~(d) Nothing in this subsection limits the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting, or after conclusion of the litigation.~~

~~(e) Notice under paragraph (a) is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.~~

Section 6. Subsection (20) of section 736.0816, Florida Statutes, is amended to read:

736.0816 Specific powers of trustee.—Except as limited or restricted by this code, a trustee may:

(20) Employ persons, including, but not limited to, attorneys, accountants, investment advisers, or agents, even if they are the trustee, an affiliate of the trustee, or otherwise associated with the trustee, to advise or assist the trustee in the exercise of any of the trustee's powers and pay reasonable compensation and costs incurred in connection with such employment from the assets of the trust, subject to s. 736.0802(10) with respect to attorney fees and costs, and act without independent investigation on the recommendations of such persons.

Section 7. Subsection (1) of section 736.1007, Florida Statutes, is amended to read:

736.1007 Trustee's attorney's fees.—

(1) If the trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is entitled to reasonable compensation for those legal services, payable from the assets of the trust, subject to s. 736.0802(10), without court order. 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 on 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 attorney's fees and costs.

Section 8. This act shall take effect July 1, 2016.

Approved by the Governor April 6, 2016.

Filed in Office Secretary of State April 6, 2016.