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1
2 An act relating to trust administration; amending s.
3 733.607, F.S.; limiting a personal representative's
4 entitlement to payment from a trust of certain estate
5 expenses and obligations; specifying application of
6 certain criteria in making certain payments from a
7 trust; amending s. 733.707, F.S.; specifying
8 application of additional provisions to liability for
9 certain estate expense and obligation payments from a
10 trust; amending s. 736.0206, F.S.; deleting certain
11 notice requirements relating to court review of a
12 trustee's employment of certain persons; authorizing
13 the award of expert witness fees from trust assets
14 rather than requiring the award of such fees;
15 providing a limitation; creating s. 736.04114, F.S.;
16 providing for interpretation of trusts not subject to
17 the federal estate tax; providing conditions;
18 providing definitions; providing criteria for a court
19 interpreting a trust; providing an exception; allowing
20 a trustee to take certain actions pending a
21 determination of trust distribution; limiting trustee
22 liability; providing for interpretation; providing for
23 retroactive effect; amending s. 736.0505, F.S.;
24 revising a value criterion for determining the extent
25 of treating the holder of a power of withdrawal as the
26 settlor of a trust; providing criteria for determining
27 who contributed certain trust assets under certain
28 circumstances; amending s. 736.05053, F.S.; requiring
29 application of priorities for pro rata abatement of

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30 nonresiduary trust dispositions together with
31 nonresiduary devises; amending s. 736.1007, F.S.;
32 deleting authority for a court to determine an
33 attorney's compensation; deleting certain expert
34 testimony and fee payment provisions; deleting
35 requirements for certain court compensation
36 determination proceedings to be part of a trust
37 administration process and for court determination and
38 payment of certain estate costs and fees from trust
39 assets; creating s. 736.1211, F.S.; prohibiting state
40 agencies and local governments from requiring the
41 disclosure of certain characteristics of persons
42 associated with certain charitable organizations,
43 trusts, and foundations; prohibiting state agencies
44 and local governments from requiring certain private
45 foundations or trusts to disclose certain
46 characteristics of persons associated with an entity
47 receiving monetary or in-kind contributions from the
48 foundation or trust; prohibiting state agencies and
49 local governments from requiring that individuals
50 having certain characteristics be included on the
51 governing board or as officers of certain charitable
52 organizations, trusts, or foundations; prohibiting
53 state agencies and local governments from prohibiting
54 a person from serving on the board or as an officer
55 based on the person's familial relationship to other
56 board members, officers, or a donor; prohibiting state
57 agencies and local governments from requiring that
58 certain charitable organizations, trusts, or

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59 foundations distribute funds to or contract with
60 persons or entities having certain characteristics;
61 specifying the effect of the act on contracts in
62 existence before the effective date of the act;
63 providing effective dates.
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65 Be It Enacted by the Legislature of the State of Florida:
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67 Section 1. Subsection (2) of section 733.607, Florida
68 Statutes, is amended to read:

69 733.607 Possession of estate.—

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

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

83 733.707 Order of payment of expenses and obligations.—

84 (3) Any portion of a trust with respect to which a decedent
85 who is the grantor has at the decedent's death a right of
86 revocation, as defined in paragraph (e), either alone or in
87 conjunction with any other person, is liable for the expenses of

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88 the administration and obligations of the decedent's estate to
89 the extent the decedent's estate is insufficient to pay them as
90 provided in ss. ~~s.~~ 733.607(2) and 736.05053.

91 (a) For purposes of this subsection, any trusts established
92 as part of, and all payments from, either an employee annuity
93 described in s. 403 of the Internal Revenue Code of 1986, as
94 amended, an Individual Retirement Account, as described in s.
95 408 of the Internal Revenue Code of 1986, as amended, a Keogh
96 (HR-10) Plan, or a retirement or other plan established by a
97 corporation which is qualified under s. 401 of the Internal
98 Revenue Code of 1986, as amended, shall not be considered a
99 trust over which the decedent has a right of revocation.

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

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

108 (d) For purposes of this subsection, property held or
109 received by a trust to the extent that the property would not
110 have been subject to claims against the decedent's estate if it
111 had been paid directly to a trust created under the decedent's
112 will or other than to the decedent's estate, or assets received
113 from any trust other than a trust described in this subsection,
114 shall not be deemed assets of the trust available to the
115 decedent's estate.

116 (e) For purposes of this subsection, a "right of

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117 revocation" is a power retained by the decedent, held in any
118 capacity, to:

119 1. Amend or revoke the trust and reconstitute the principal of
120 the trust in the decedent; or

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

123 Section 3. Subsections (1), (5), (6), and (7) of section
124 736.0206, Florida Statutes, are amended to read:

125 736.0206 Proceedings for review of employment of agents and
126 review of compensation of trustee and employees of trust.—

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

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

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

143 (6) ~~(7)~~ In a proceeding pursuant to subsection (2), the
144 petitioner may serve formal notice as provided in the Florida
145 Probate Rules, and such notice shall be sufficient for the court

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146 to acquire jurisdiction over the person receiving the notice to
147 the extent of the person's interest in the trust.

148 Section 4. Effective upon this act becoming a law, section
149 736.04114, Florida Statutes, is created to read:

150 736.04114 Limited judicial construction of irrevocable
151 trust with federal tax provisions.—

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

158 (a) Includes a formula disposition referring to the
159 "unified credit," "estate tax exemption," "applicable exemption
160 amount," "applicable credit amount," "applicable exclusion
161 amount," "generation-skipping transfer tax exemption," "GST
162 exemption," "marital deduction," "maximum marital deduction,"
163 "unlimited marital deduction," or "maximum charitable
164 deduction";

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

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

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

173 (2) For the purpose of this section:

174 (a) "Applicable period" means a period beginning January 1,

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175 2010, and ending on the end of the day on the earlier of:

176 1. December 31, 2010; or

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

181 (b) A "disposition occurs" when an interest takes effect in
182 possession or enjoyment.

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

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

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

197 (a) Delay or refrain from making any distribution;

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

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

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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

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233 amended, has been made; and

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

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

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

243 736.05053 Trustee's duty to pay expenses and obligations of
244 settlor's estate.—

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

250 Section 7. Subsections (7) through (10) of section
251 736.1007, Florida Statutes, are amended to read:

252 736.1007 Trustee's attorney's fees.—

253 ~~(7) The court may determine reasonable attorney's~~
254 ~~compensation without receiving expert testimony. Any party may~~
255 ~~offer expert testimony after notice to interested persons. If~~
256 ~~expert testimony is offered, an expert witness fee may be~~
257 ~~awarded by the court and paid from the assets of the trust. The~~
258 ~~court shall direct from what part of the trust the fee is to be~~
259 ~~paid.~~

260 (7)(8) If a separate written agreement regarding
261 compensation exists between the attorney and the settlor, the

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262 attorney shall furnish a copy to the trustee prior to
263 commencement of employment and, if employed, shall promptly file
264 and serve a copy on all interested persons. A separate agreement
265 or a provision in the trust suggesting or directing the trustee
266 to retain a specific attorney does not obligate the trustee to
267 employ the attorney or obligate the attorney to accept the
268 representation but, if the attorney who is a party to the
269 agreement or who drafted the trust is employed, the compensation
270 paid shall not exceed the compensation provided in the
271 agreement.

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

279 (8) ~~(10)~~ As used in this section, the term "initial trust
280 administration" means administration of a revocable trust during
281 the period that begins with the death of the settlor and ends on
282 the final distribution of trust assets outright or to continuing
283 trusts created under the trust agreement but, if an estate tax
284 return is required, not until after issuance of an estate tax
285 closing letter or other evidence of termination of the estate
286 tax proceeding. This initial period is not intended to include
287 continued regular administration of the trust.

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

290 736.1211 Protections afforded to certain charitable trusts

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291 and organizations.-

292 (1) A charitable organization, private foundation trust,
293 split interest trust, or a private foundation as defined in s.
294 509(a) of the Internal Revenue Code may not be required by a
295 state agency or a local government to disclose the race,
296 religion, gender, national origin, socioeconomic status, age,
297 ethnicity, disability, marital status, sexual orientation, or
298 political party registration of its employees, officers,
299 directors, trustees, members, or owners, without the prior
300 written consent of the individual or individuals in question.

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

316 (3) A state agency or a local government may not require
317 that the governing board or officers of a charitable
318 organization, private foundation trust, split interest trust, or
319 a private foundation as defined in s. 509(a) of the Internal

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320 Revenue Code include an individual or individuals of any
321 particular race, religion, gender, national origin,
322 socioeconomic status, age, ethnicity, disability, marital
323 status, sexual orientation, or political party registration.
324 Further, a state agency or a local government may not prohibit
325 service as a board member or officer by an individual or
326 individuals based upon their familial relationship to each other
327 or to a donor or require that the governing board or officers
328 include one or more individuals who do not share a familial
329 relationship with each other or with a donor.

330 (4) A charitable organization, private foundation trust,
331 split interest trust, or any private foundation as defined in s.
332 509(a) of the Internal Revenue Code may not be required by a
333 state agency or a local government to distribute its funds to or
334 contract with any person or entity based upon the race,
335 religion, gender, national origin, socioeconomic status, age,
336 ethnicity, disability, marital status, sexual orientation, or
337 political party registration of the person or of the employees,
338 officers, directors, trustees, members, or owners of the entity,
339 or based upon the populations, locales, or communities served by
340 the person or entity, except as a lawful condition on the
341 expenditure of particular funds imposed by the donor of such
342 funds.

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

345 Section 10. Except as otherwise expressly provided in this
346 act and except for this section, which shall take effect upon
347 this act becoming a law, this act shall take effect July 1,
348 2010.