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97-290

HAVE

19/2888 HB 1411 SA 4/12/97 - Real Prop. - 4/15 mtg. ~~2356~~  
4/16/97 - " -  
6/9/97 - " - FINAL

18/2270 CS/SB 818, 1136 + 1242  
SA 4/3/97 Jud  
mtg. 4/2 (18/2273)

14 pp. 2.50  
1.50  
3.50

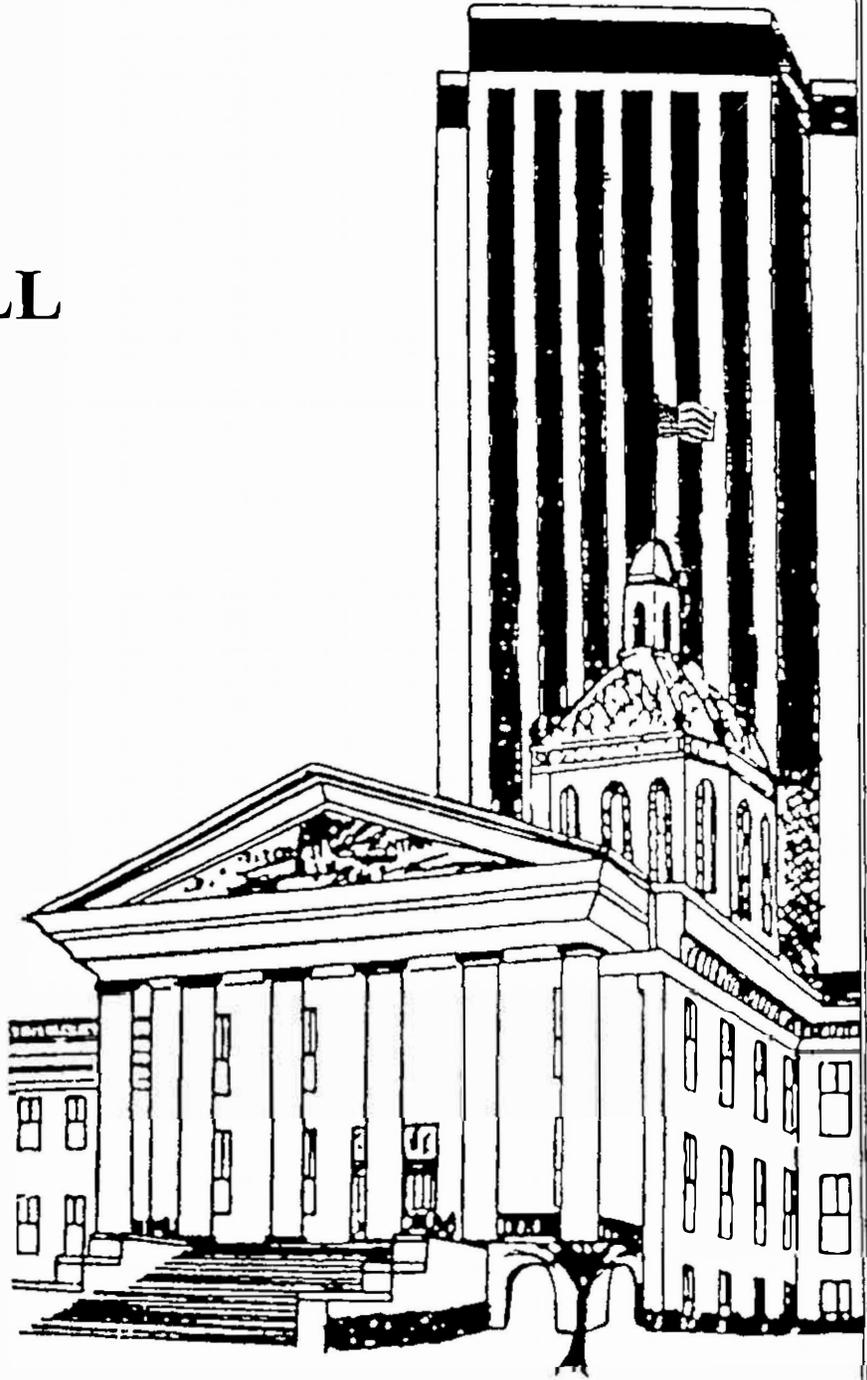
FL BAR LOBBYIST (?)

Linda McMullen (now is MS)

# FLORIDA LEGISLATURE

## FINAL LEGISLATIVE BILL INFORMATION

*1997 Regular Session*



prepared by:

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## HISTORY OF HOUSE BILLS

## H 1405 (CONTINUED):

05/20/97 HOUSE Withdrawn from Health Care Services (GSC), Withdrawn from further consideration (Identical/Compare Bills) passed, refer to HB 1965 (Ch 97-263)

## H 1407 GENERAL BILL/CS by Regulated Services (EIC); Rodriguez-Chomat; (CO-SPONSORS) Fassano, Edwards (Compare H 0015, S 0502)

Lottery/Public Assistance Recipients, provides for reducing prize amounts to certain persons who receive public assistance, & for deducting overpayments from public assistance payment under certain circumstances, provides for agency responsibility for identifying certain recipients of public assistance, provides for disposition of remainders of lottery prizes under certain circumstances, provides reporting requirements, etc Amends 24 115, 414 28 Effective Date 10/01/1997

03/13/97 HOUSE Filed

03/19/97 HOUSE Introduced -HJ 00229

03/24/97 HOUSE Referred to Regulated Services (EIC), Finance & Taxation (FRC), General Government Appropriations -HJ 00324

04/03/97 HOUSE On Committee agenda—Regulated Services (EIC), 04/03/97, 9 00 am, 314—HOB, Comm Action CS by Regulated Services (EIC) -HJ 00496

04/09/97 HOUSE CS read first time on 04/09/97 -HJ 00491

04/08/97 HOUSE Now in Finance & Taxation (FRC) -HJ 00496

05/02/97 HOUSE Carried over to 1998 Session pursuant to House Rule 96, In House Committee on Finance & Taxation (FRC)

## H 1409 GENERAL BILL by Dennis (Identical S 1942)

Edward Waters College License Plate, creates Edward Waters College license plate, provides for distribution of annual use fees received from sale of such plates Amends 320 08056, 08058 Effective Date 07/01/1997 if enacted by 3/5ths vote of membership of each house of Legislature

03/13/97 HOUSE Filed

03/19/97 HOUSE Introduced -HJ 00229

05/02/97 HOUSE Carried over to 1998 Session pursuant to House Rule 96, Introduced, not referred

## H 1411 GENERAL BILL/1ST ENG by Bloom, Laurent (Similar CS/S 0818, Compare H 0931, S 1136, S 1242)

Trusts & Estates/Administration, provides statement of rule against perpetuities, increases ceiling on funeral expenses, revises provisions re execution requirements for express trusts, revises list of services that constitute ordinary services in initial trust administration, provides for specified notice to trustee & caveator, provides requirements on opening certain safe-deposit boxes, etc Amends Chs 733, 737, 518 112, 655 936, 689 225, 709 08, 738 12, 744 441 Effective Date 05/30/1997 except as otherwise provided

03/13/97 HOUSE Filed

03/19/97 HOUSE Introduced -HJ 00229

04/09/97 HOUSE Referred to Real Property & Probate (JC) -HJ 00485, On Committee agenda—Real Property & Probate (JC), 04/15/97, 4 30 pm, 413C

04/15/97 HOUSE Comm Action -Unanimously Favorable with 1 amendment(s) by Real Property & Probate (JC) -HJ 00596

04/17/97 HOUSE Pending Consent Calendar -HJ 00596

04/21/97 HOUSE Available for Consent Calendar

04/24/97 HOUSE Placed on Consent Calendar

04/25/97 HOUSE Read second time -HJ 00912, Amendment(s) adopted -HJ 00912, Read third time -HJ 00920, Passed as amended, YEAS 112 NAYS 0 -HJ 00920

04/28/97 SENATE In Messages

05/01/97 SENATE Received, referred to Judiciary -SJ 01302

05/02/97 SENATE Withdrawn from Judiciary -SJ 01318, Substituted for CS/SB 818 -SJ 01318, Read second and third times -SJ 01318, Passed, YEAS 39 NAYS 0 -SJ 01318

05/02/97 HOUSE Ordered enrolled -HJ 02189

05/14/97 Signed by Officers and presented to Governor

05/30/97 Became Law without Governor's Signature, Chapter No 97-240

## H 1413 GENERAL BILL/CS/2ND ENG by Finance &amp; Taxation (FRC); Reddick; (CO-SPONSORS) Culp; K. Pruitt; Burroughs; Mackey (Similar CS/H 0957, CS/S 0998, Compare 2ND ENG/H 0755, 1ST ENG/H 1997, CS/S 0718, CS/1ST ENG/S 1414, CS/3RD ENG/S 1754, CS/S 2048)

Electronic Commerce, specifies "electronic notarization", authorizes Secretary of State to establish voluntary licensure program for private certification authorities, provides for electronic engineering seals & digital signatures, provides for electronic land surveying & mapping seals, provides for acceptance of charge cards & debits cards by state agencies, units of local governments, & judicial branch, etc Amends FS Effective Date 05/30/1997

03/13/97 HOUSE Filed

03/19/97 HOUSE Introduced -HJ 00229

03/24/97 HOUSE Referred to Governmental Rules & Regulations (GRC), Finance & Taxation (FRC), General Government Appropriations -HJ 00324

## H 1413 (CONTINUED):

03/25/97 HOUSE On Committee agenda—Governmental Rules & Regulations (GRC), 03/31/97, 3 30 pm, Morris Hall

03/31/97 HOUSE Comm Action Unanimously Favorable with 1 amendment(s) by Governmental Rules & Regulations (GRC) -HJ 00399

04/02/97 HOUSE Now in Finance & Taxation (FRC) -HJ 00399

04/07/97 HOUSE On Committee agenda—Finance & Taxation (FRC), 04/11/97, 1 00 pm, Morris Hall

04/11/97 HOUSE Comm Action Unanimously CS by Finance & Taxation (FRC) -HJ 00597

04/16/97 HOUSE CS read first time on 04/16/97 -HJ 00593, Now in General Government Appropriations -HJ 00597, On Committee agenda—General Government Appropriations, 04/18/97, 9 00 am, 214C

04/18/97 HOUSE Comm Action—Unanimously Favorable with 1 amendment(s) by General Government Appropriations -HJ 00666

04/22/97 HOUSE Pending Consent Calendar -HJ 00666

04/24/97 HOUSE Available for Consent Calendar

04/25/97 HOUSE Placed on Consent Calendar, Read second time -HJ 00953, Amendment(s) adopted -HJ 00953, Read third time -HJ 00954, CS passed as amended, YEAS 115 NAYS 0 -HJ 00954

04/28/97 SENATE In Messages, Received, referred to Governmental Reform and Oversight, Ways and Means -SJ 00719, Immediately withdrawn from Governmental Reform and Oversight, Ways and Means -SJ 00669, Substituted for CS/SB 718 -SJ 00669, Read second time -SJ 00669, Amendment(s) adopted -SJ 00669

04/29/97 SENATE Read third time -SJ 00727, Amendment(s) adopted -SJ 00727, CS passed as amended, YEAS 38 NAYS 0 -SJ 00727

04/29/97 HOUSE In returning messages

05/01/97 HOUSE Concurred -HJ 01489, CS passed as amended, YEAS 119 NAYS 0 -HJ 01491, Ordered engrossed, then enrolled -HJ 01491

05/14/97 Signed by Officers and presented to Governor

05/30/97 Became Law without Governor's Signature, Chapter No 97-241, See also CS/SB 1754 (Ch 97-278)

## H 1415 GENERAL BILL/1ST ENG by Silver; Lacasa; Lippman; (CO-SPONSORS) Rodriguez-Chomat; Frankel; Murman; Geiler; Morrison; Barreiro; Brown; Heyman; Posey; Sindler, Wasserman Schultz (Identical CS/1ST ENG/S 1420)

Pawnbroking Act, provides substantive & procedural changes to act, provides criminal penalties, modifies requirements for eligibility for license, requires pawnbrokers to insure pledged goods in amount not less than actual value of said goods, amends provision re confidentiality of records re pawnbroker transactions delivered to law enforcement officers to authorize release of confidential info under specified circumstances, etc Amends 539 001, 003 Effective Date Upon becoming law except as otherwise provided

03/13/97 HOUSE Filed

03/19/97 HOUSE Introduced -HJ 00229

03/24/97 HOUSE Referred to Business Regulation & Consumer Affairs (EIC), General Government Appropriations -HJ 00324, On Committee agenda—Governmental Rules & Regulations (GRC), 03/27/97, 9 00 am, 314—HOB—Not received

04/02/97 HOUSE On Committee agenda—Business Regulation & Consumer Affairs (EIC), 04/08/97, 10 30 am, 214C

04/08/97 HOUSE Comm Action Unanimously Favorable with 1 amendment(s) by Business Regulation & Consumer Affairs (EIC) -HJ 00530

04/10/97 HOUSE Now in General Government Appropriations -HJ 00530

04/16/97 HOUSE Withdrawn from General Government Appropriations -HJ 00574

04/17/97 HOUSE Pending Consent Calendar

04/18/97 HOUSE Placed on Economic Impact Council Calendar -HJ 00665

04/25/97 HOUSE Read second time -HJ 01037, Amendment(s) adopted -HJ 01037

05/02/97 HOUSE Carried over to 1998 Session pursuant to House Rule 96, Placed on Economic Impact Council Calendar, Identical/Compare Bill(s) passed, refer to CS/SB 1420 (Ch 97-304)

## H 1417 JOINT RESOLUTION by Bronson; (CO-SPONSORS) Bainter; Futch; Casey; Wallace; Sembler; Minton, K. Pruitt; Byrd, Spratt, Mackey; Peaden, Putnam; Harrington, Westbrook; Trevillion; Merchant; Fuller, Carlton; Murman; Fassano; Kelly, Thrasher; Ball, Ogles, Feeney, Starks, Arnall, Wise; Albright; Dockery; Littlefield, King; Jones (Compare H 1951, CS/S 1266, S 1268)

Executive Departments/Ad Val Taxes constitutional amendment to increase limitation on number of executive departments & authorizes state ad valorem taxes for water management purposes Amends s 6, Art IV, s 1, Art VII

03/13/97 HOUSE Filed

03/19/97 HOUSE Introduced -HJ 00229

## HISTORY OF SENATE BILLS

- S 804 GENERAL BILL by Clary (Compare H 0903, CS/S 0412)**  
Marine Net Fishing, (THIS BILL COMBINED IN CS/S412.140.804) defines terms "netting material" & "net" for constitutional, statutory, & administrative law purposes Amends 370 01 Effective Date 07/01/1997  
 02/21/97 SENATE Prefiled  
 03/04/97 SENATE Introduced, referred to Natural Resources -SJ 00083  
 03/10/97 SENATE On Committee agenda—Natural Resources, 03/12/97, 2 00 pm, Room—A(LL—37)  
 03/12/97 SENATE CS combines this bill with 412 & 140, Comm Action CS by Natural Resources -SJ 00236, Original bill laid on Table, refer to combined CS/SB 412 (Died in Senate Ways and Means Committee)
- S 806 GENERAL BILL/CS by Judiciary; Grant (Similar H 0913)**  
Eminent Domain Acquisitions, provides for written offer of settlement as part of prelitigation notice, requires property owners who intend to claim business damages to provide certain documentation, provides that jury must determine compensation in eminent domain actions, provides for consideration of business damages, provides for determination of compensation in inverse condemnation proceedings, etc Amends 73 0511, 071, 337 271, creates 74 0205, 042 Effective Date 10/01/1997  
 02/21/97 SENATE Prefiled  
 03/04/97 SENATE Introduced, referred to Judiciary, Governmental Reform and Oversight -SJ 00083  
 03/21/97 SENATE On Committee agenda—Judiciary, 03/25/97, 3 30 pm, Room—1C(309)—Not considered  
 03/26/97 SENATE Also referred to Ways and Means -SJ 00269  
 03/28/97 SENATE On Committee agenda—Judiciary, 04/02/97, 2 30 pm, Room—1C(309)  
 04/02/97 SENATE Comm Action CS by Judiciary -SJ 00391, CS read first time on 04/07/97 -SJ 00394  
 04/03/97 SENATE Withdrawn from—Governmental Reform and Oversight, Ways and Means -SJ 00324, Rereferred to—Governmental Reform and Oversight, Transportation, Ways and Means -SJ 00324  
 04/04/97 SENATE Now in Governmental Reform and Oversight -SJ 00391  
 04/10/97 SENATE On Committee agenda—Governmental Reform and Oversight, 04/14/97, 1 00 pm, Room—1C(309)  
 04/14/97 SENATE Comm Action Favorable with 1 amendment(s) by Governmental Reform and Oversight -SJ 00500  
 04/15/97 SENATE Now in Transportation -SJ 00500  
 04/17/97 SENATE Withdrawn from Transportation -SJ 00509, Now in Ways and Means  
 04/25/97 SENATE Withdrawn from Ways and Means -SJ 00604, Placed on Calendar  
 05/02/97 SENATE Died on Calendar
- S 808 GENERAL BILL by Grant (Similar CS/H 0531)**  
Small Business Employment Incentives, provides for issuing tax credit vouchers to small businesses as employment incentives, requires DOR to develop forms & procedures, limits availability of credit vouchers Effective Date 07/01/1997  
 02/21/97 SENATE Prefiled  
 03/04/97 SENATE Introduced, referred to Commerce and Economic Opportunities, Ways and Means -SJ 00083  
 03/06/97 SENATE On Committee agenda—Commerce and Economic Opportunities, 03/10/97, 2 00 pm, Room—EL—Temporarily postponed  
 05/02/97 SENATE Died in Committee on Commerce and Economic Opportunities
- S 810 GENERAL BILL by Grant**  
Health Care Responsibility/AHCA, directs AHCA to convene task force on Fla Health Care Responsibility Act of 1988, provides for membership, specifies topics for task force study, requires report, provides agency duties Effective Date Upon becoming law  
 02/21/97 SENATE Prefiled  
 03/04/97 SENATE Introduced, referred to Health Care -SJ 00083  
 03/14/97 SENATE On Committee agenda—Health Care, 03/18/97, 9 00 am, Room—EL—Not considered  
 03/21/97 SENATE On Committee agenda—Health Care, 03/25/97, 12 30 pm, Room—EL  
 03/25/97 SENATE Comm Action -Favorable with 1 amendment(s) by Health Care -SJ 00277  
 03/26/97 SENATE Placed on Calendar -SJ 00277  
 05/02/97 SENATE Died on Calendar
- S 812 GENERAL BILL by Grant (Compare CS/1ST ENG/H 0117, CS/CS/2ND ENG/S 1660)**  
Sales Tax/Gasparilla Distance Assn, provides exemption for Gasparilla Distance Classic Association Inc, in specified circumstances Amends 212 08 Effective Date 07/01/1997  
 02/21/97 SENATE Prefiled  
 03/04/97 SENATE Introduced, referred to Commerce and Economic Opportunities, Ways and Means -SJ 00083
- S 812 (CONTINUED)**  
 05/02/97 SENATE Died in Committee on Commerce and Economic Opportunities
- S 814 GENERAL BILL by Grant; (CO-SPONSORS) Williams; Childers; Casas; Thomas (Similar H 0483, Compare CS/1ST ENG/H 1549, CS/1ST ENG/S 1286)**  
Motor Vehicle & Casualty Insurance, prescribes notice requirements re non-payment of premiums, revises certain per-policy fees Amends 627.728, 7295 Effective Date Upon becoming law  
 02/21/97 SENATE Prefiled  
 03/04/97 SENATE Introduced, referred to Banking and Insurance -SJ 00083  
 04/11/97 SENATE On Committee agenda—Banking and Insurance, 04/15/97, 9 00 am, Room—EL  
 04/15/97 SENATE Comm Action -Favorable with 2 amendment(s) by Banking and Insurance -SJ 00521  
 04/16/97 SENATE Placed on Calendar -SJ 00521  
 05/02/97 SENATE Died on Calendar, Iden /Sim /Compare Bill(s) passed, refer to CS/SB 1286 (Ch 97-178)
- S 816 GENERAL BILL by Grant**  
Insurance Commissioner, transfers responsibilities of head of DOI from State Treasurer to appointed Insurance Commissioner, transfers responsibility for making appointment, amends specified provisions to conform terminology to change made by act Amends FS Effective Date 07/01/1997  
 02/21/97 SENATE Prefiled  
 03/04/97 SENATE Introduced, referred to Banking and Insurance, Governmental Reform and Oversight, Ways and Means -SJ 00083  
 05/02/97 SENATE Died in Committee on Banking and Insurance
- S 818 GENERAL BILL/CS by Judiciary; Grant; Lee; Dudley (Similar 1ST ENG/H 1411, Compare H 0931, S 1136, S 1242)**  
Trusts & Estates Administration, (THIS BILL COMBINES S818,1136,1242) provides statement of rule against perpetuities, authorizes certain corporations to serve as attorney in fact, increases ceiling on funeral expenses, defines term "right of revocation" re order of payment of expenses & obligations of estate, revises provisions re execution requirements for express trusts, provides for application of section, etc Amends Chs 518, 689, 709, 733, 737, 738, 744 Effective Date Upon becoming law except as otherwise provided  
 02/21/97 SENATE Prefiled  
 03/04/97 SENATE Introduced, referred to Judiciary -SJ 00083  
 03/17/97 SENATE On Committee agenda—Judiciary, 03/19/97, 2 00 pm, Room—1C(309)—Temporarily postponed  
 03/21/97 SENATE On Committee agenda—Judiciary, 03/25/97, 3 30 pm, Room—1C(309)—Not considered  
 03/28/97 SENATE On Committee agenda—Judiciary, 04/02/97, 2 30 pm, Room—1C(309)  
 04/02/97 SENATE CS combines this bill with 1136 & 1242, Comm Action -CS by Judiciary -SJ 00392, CS read first time on 04/07/97 -SJ 00395  
 04/04/97 SENATE Placed on Calendar -SJ 00392  
 04/24/97 SENATE Placed on Special Order Calendar -SJ 00583  
 04/25/97 SENATE Placed on Special Order Calendar -SJ 00583  
 04/28/97 SENATE Placed on Special Order Calendar -SJ 00651  
 04/29/97 SENATE Placed on Special Order Calendar -SJ 00709, -SJ 00938  
 04/30/97 SENATE Placed on Special Order Calendar -SJ 00938, -SJ 01096  
 05/01/97 SENATE Placed on Special Order Calendar -SJ 00957, -SJ 01096  
 05/02/97 SENATE Placed on Consent Calendar -SJ 01843, Read second time -SJ 01318, Amendment(s) adopted -SJ 01318, House Bill substituted -SJ 01318, Laid on Table, Iden /Sim / Compare Bill(s) passed, refer to HB 1411 (Ch 97-240)
- S 820 GENERAL BILL by Klein; (CO-SPONSORS) Turner (Identical H 0116)**  
Veterans/ID Card Renewals, eliminates requirement of renewing identification cards, eliminates service charge Amends 295 17 Effective Date 07/01/1997  
 02/21/97 SENATE Prefiled  
 03/04/97 SENATE Introduced, referred to Community Affairs, Ways and Means -SJ 00083  
 03/07/97 SENATE On Committee agenda—Community Affairs, 03/11/97, 9 00 am, Room—1C(309)  
 03/11/97 SENATE Comm Action Favorable by Community Affairs -SJ 00140, Now in Ways and Means -SJ 00140  
 03/19/97 SENATE Withdrawn from Ways and Means -SJ 00212, Placed on Calendar  
 04/03/97 SENATE Placed on Special Order Calendar -SJ 00361  
 04/07/97 SENATE Placed on Special Order Calendar -SJ 00324, House Bill substituted -SJ 00390, Laid on Table, Iden /Sim / Compare Bill(s) passed, refer to HB 115 (Ch 97-14)
- S 822 GENERAL BILL by Klein; (CO-SPONSORS) Forman (Compare 2ND ENG/H 1357, 2ND ENG/H 1837, CS/CS/S 0562, S 1960)**  
Dept of Health/HRS/AHCA/DOC, (THIS BILL COMBINED IN CS/S552,1960,822) authorizes Health Dept to use certain funds to promote public health, provides dept with greater flexibility in budget expenditures, (CONTINUED ON NEXT PAGE)

## HISTORY OF HOUSE BILLS

## H 925 (CONTINUED)

05/02/97 HOUSE Carried over to 1998 Session pursuant to House Rule 96, In House Committee on Governmental Operations (GRC), Iden/Sim/Compare Bill(s) passed refer to CS/HB 419 (Ch 97-318), CS/SB 1366 (Ch 97-314)

H 927 LOCAL BILL/1ST ENG by Livingston (Similar S 0906, Compare H 0421, H 0423, 2ND ENG/H 0425, H 0429, H 0567, 1ST ENG/H 0619, 1ST ENG/H 1741, S 0740, S 0742, S 0744, S 0994, CS/S 1248, S 1894, S 1896) Independent Fire Control Districts, (Lee Co) prescribes uniform criteria for operation of independent special fire-control districts, preempts certain special acts & general acts of local application, provides for district boards of commissioners & for their election, provides for ad valorem taxes, non-ad valorem assessments, user charges, bonds, & impact fees, provides for intergovernmental coordination, provides for expansion, merger, & dissolution of districts, etc Effective Date 05/30/1997

02/27/97 HOUSE Prefiled

03/04/97 HOUSE Introduced -HJ 00100

03/11/97 HOUSE Referred to Community Affairs (GRC) -HJ 00240

03/21/97 HOUSE On Committee agenda—Community Affairs (GRC), 03/27/97, 9 00 am, Morris Hall

03/27/97 HOUSE Comm Action -Unanimously Favorable with 4 amendment(s) by Community Affairs (GRC) -HJ 00375

04/01/97 HOUSE Placed on Calendar -HJ 00375

04/24/97 HOUSE Placed on Local Calendar, Read second time -HJ 00826, Amendment(s) adopted -HJ 00827, Read third time -HJ 00827, Passed as amended, YEAS 115 NAYS 0 -HJ 00827

04/25/97 SENATE In Messages

04/28/97 SENATE Received, referred to Community Affairs, Rules and Calendar -SJ 00717

04/29/97 SENATE Withdrawn from Community Affairs -SJ 00724, Now in Rules and Calendar

04/30/97 SENATE Considered by Rules and Calendar, placed on Local Calendar -SJ 01096

05/01/97 SENATE Placed on Local Calendar -SJ 00957, Read second and third times -SJ 01138, Passed, YEAS 40 NAYS 0 -SJ 01138

05/01/97 HOUSE Ordered enrolled -HJ 01755

05/14/97 Signed by Officers and presented to Governor

05/30/97 Became Law without Governor's Signature, Chapter No 97-340, See also HB 1741 (Ch 97-256)

H 929 GENERAL BILL by Wise; (CO-SPONSORS) Jones; Littlefield; Bronson; Morse; Gay; Eggelletion; Mackey; Merchant; Stabins; Burroughs; Feeney; Arnall; Lippman; Effman; Kelly; Brennan; Ogles; Morroni; King; Lynn (Similar S 0836) Licensed Optometrists/Hospitals, provides for staff membership & clinical privileges for licensed optometrists in hospitals & other licensed facilities Amends 395 0191 Effective Date 10/01/1997

02/27/97 HOUSE Prefiled

03/04/97 HOUSE Introduced -HJ 00100

03/11/97 HOUSE Referred to Health Care Services (GSC), Business Regulation & Consumer Affairs (EIC), Health & Human Services Appropriations -HJ 00240

03/18/97 HOUSE On Committee agenda—Health Care Services (GSC), 03/24/97, 1 00 pm, Morris Hall—Temporarily deferred

04/30/97 HOUSE Withdrawn from Health Care Services (GSC), Business Regulation & Consumer Affairs (EIC), Health & Human Services Appropriations, Withdrawn from further consideration -HJ 01223

H 931 GENERAL BILL by Laurent (Identical S 1136, Compare 1ST ENG/H 1411, CS/S 0818)

Nonprofit Corps/Attorney in Fact, authorizes certain corporations to act as attorney in fact, provides limitation Amends 709 08 Effective Date 07/01/1997

02/27/97 HOUSE Prefiled

03/04/97 HOUSE Introduced -HJ 00100

04/11/97 HOUSE Referred to Real Property & Probate (JC) -HJ 00524

04/16/97 HOUSE Withdrawn from Real Property & Probate (JC), Withdrawn from further cons ,Iden/Sim/Compare Bill(s) passed, refer to HB 1411 (Ch 97-240) -HJ 00564

H 933 GENERAL BILL/CS by Governmental Operations (GRC); Martinez (Compare CS/CS/S 0548)

Retirement Trust Funds/Investments, prescribes authorized investments for firefighters' pension trust funds & for municipal police officers' retirement trust funds Amends 175 071, 185 06 Effective Date Upon becoming law

02/27/97 HOUSE Prefiled

03/04/97 HOUSE Introduced -HJ 00100

03/11/97 HOUSE Referred to Governmental Operations (GRC), Finance & Taxation (FRC), General Government Appropriations -HJ 00240

03/21/97 HOUSE On Committee agenda—Governmental Operations (GRC), 03/27/97, 9 00 am, 413C

03/27/97 HOUSE Comm Action Unanimously CS by Governmental Operations (GRC) -HJ 00494

## H 933 (CONTINUED)

04/09/97 HOUSE CS read first time on 04/09/97 -HJ 00489

04/07/97 HOUSE Now in Finance & Taxation (FRC) -HJ 00494

04/16/97 HOUSE Withdrawn from Finance & Taxation (FRC) -HJ 00574, Now in General Government Appropriations

05/02/97 HOUSE Carried over to 1998 Session pursuant to House Rule 96, In House Committee on General Government Appropriations

H 935 GENERAL BILL/CS by Civil Justice & Claims (JC); Warner (Similar CS/S 0914)

Legal Process, provides that substitute service may be made upon person in charge of sole proprietorship business at time of service, under specified circumstances, provides for service of process in action for possession of residential premises, provides for application & fee for inclusion on list of certified process servers, authorizes certain service when civil action has been filed in circuit or county court, etc Amends Ch 48, 55 03, 56 27, 28 Effective Date 10/01/1997

02/28/97 HOUSE Prefiled

03/04/97 HOUSE Introduced -HJ 00100

03/11/97 HOUSE Referred to Civil Justice & Claims (JC) -HJ 00240

03/14/97 HOUSE On Committee agenda—Civil Justice & Claims (JC), 03/20/97, 1 00 pm, 102-HOB

03/20/97 HOUSE Comm Action -Unanimously CS by Civil Justice & Claims (JC) -HJ 00398

04/02/97 HOUSE CS read first time on 04/02/97 -HJ 00397

04/03/97 HOUSE Pending Consent Calendar -HJ 00398, Placed on Justice Council Calendar -HJ 00492

04/14/97 HOUSE Read second time -HJ 00546

04/16/97 HOUSE Read third time -HJ 00569, CS passed, YEAS 116 NAYS 0 -HJ 00569

04/17/97 SENATE In Messages

04/24/97 SENATE Received, referred to Judiciary; Ways and Means -SJ 00601

05/02/97 SENATE Upon adjournment in Senate Judiciary, Carried over to 1998 Session pursuant to House Rule 96, Placed on House Consent Calendar

H 937 GENERAL BILL by Mackenzie; (CO-SPONSORS) Eggelletion (Compare CS/S 0956)

Municipality/Unclaimed Money, provides that specified unclaimed moneys in possession of municipality will be paid into municipality's fine & forfeiture fund Amends 116 21 Effective Date Upon becoming law

02/28/97 HOUSE Prefiled

03/04/97 HOUSE Introduced, referred to Community Affairs (GRC), Law Enforcement & Public Safety (JC) -HJ 00100

03/06/97 HOUSE On Committee agenda—Community Affairs (GRC), 03/12/97, 3 30 pm, Morris Hall—Temporarily deferred

03/13/97 HOUSE On Committee agenda—Community Affairs (GRC), 03/18/97, 1 00 pm, Morris Hall

03/18/97 HOUSE Comm Action Unanimously Favorable with 1 amendment(s) by Community Affairs (GRC) -HJ 00259

03/20/97 HOUSE Now in Law Enforcement & Public Safety (JC) -HJ 00259

04/04/97 HOUSE On Committee agenda—Law Enforcement & Public Safety (JC), 04/10/97, 2 45 pm, 317C

04/10/97 HOUSE Comm Action -Unanimously Favorable by Law Enforcement & Public Safety (JC) -HJ 00530

04/14/97 HOUSE Pending Consent Calendar -HJ 00530

04/16/97 HOUSE Available for Consent Calendar

04/24/97 HOUSE Placed on Consent Calendar, Senate Bill substituted, Laid on Table, Iden/Sim/Compare Bill(s) passed, refer to CS/SB 956 (Ch 97-56) -HJ 00757

H 939 GENERAL BILL by Melvin

Relief/Dale R Cowie, provides appropriation from funds of DMS to reimburse him for expenses incurred in completion of state contract Appropriation \$15,402 Effective Date 07/01/1997

02/28/97 HOUSE Prefiled

03/04/97 HOUSE Introduced -HJ 00100

05/02/97 HOUSE Carried over to 1998 Session pursuant to House Rule 96, Introduced, not referred

H 941 GENERAL BILL by Melvin

Relief/Ray Construction Ltd, provides appropriation to compensate Ray Construction of Okaloosa County, Ltd for documentary stamp tax assessments paid to DOR & for attorney's fees & court costs Appropriation \$18,230 Effective Date 07/01/1997

02/28/97 HOUSE Prefiled

03/04/97 HOUSE Introduced -HJ 00100

05/02/97 HOUSE Carried over to 1998 Session pursuant to House Rule 96, Introduced, not referred

H 943 GENERAL BILL/CS by Tourism (EIC), Dawson-White (Similar S 1182, Compare CS/1ST ENG/H 1145)

Professional Sports Franchises, revises definition of "league" for purposes of qualifying as facility for new professional sports franchise or facility for retained professional sports franchise, provides for creation & maintenance of

## HISTORY OF SENATE BILLS

- S 1122 (CONTINUED)**  
 04/28/97 SENATE Placed on Special Order Calendar—SJ 00709, House Bill substituted—SJ 00700, Laid on Table, Iden /Sim / Compare Bill(s) passed, refer to HB 865 (Ch 97-114)
- S 1124 GENERAL BILL by Myers (Similar H 0869)**  
Administrative TF/Health Dept., creates Administrative Trust Fund within Health Dept., provides for sources of moneys & purposes, provides for annual carryforward of funds, provides for future review & termination or re-creation of trust fund Effective Date 07/01/1997  
 03/03/97 SENATE Prefiled  
 03/12/97 SENATE Introduced, referred to Health Care, Ways and Means—SJ 00143  
 03/21/97 SENATE On Committee agenda—Health Care, 03/25/97, 12 30 pm, Room—EL  
 03/25/97 SENATE Comm Action Favorable by Health Care—SJ 00277  
 03/26/97 SENATE Now in Ways and Means—SJ 00277  
 04/18/97 SENATE On Committee agenda—Ways and Means, 04/23/97, 2 00 pm, Room—EL  
 04/23/97 SENATE Comm Action—Favorable by Ways and Means—SJ 00584  
 04/24/97 SENATE Placed on Calendar—SJ 00584  
 04/28/97 SENATE Placed on Special Order Calendar—SJ 00709, House Bill substituted—SJ 00701, Laid on Table, Iden /Sim / Compare Bill(s) passed, refer to HB 869 (Ch 97-116)
- S 1126 GENERAL BILL by Jenne**  
Grand Juries/Max Number to Serve, increases maximum number of persons which may be appointed to serve on grand jury Amends 905 01 Effective Date 07/01/1997  
 03/03/97 SENATE Prefiled  
 03/12/97 SENATE Introduced, referred to Criminal Justice—SJ 00143  
 05/02/97 SENATE Died in Committee on Criminal Justice
- S 1128 GENERAL BILL/CS by Education; Jenne**  
Superintendents of Schools/Benefits, provides limitations upon benefits that superintendent of schools may receive upon termination of employment Effective Date Upon becoming law  
 03/03/97 SENATE Prefiled  
 03/12/97 SENATE Introduced, referred to Education, Ways and Means—SJ 00143  
 03/14/97 SENATE On Committee agenda—Education, 03/18/97, 9 00 am, Room—A(LL-37)  
 03/18/97 SENATE Comm Action CS by Education—SJ 00253, CS read first time on 03/20/97—SJ 00263  
 03/20/97 SENATE Now in Ways and Means—SJ 00253  
 04/09/97 SENATE Withdrawn from Ways and Means—SJ 00404, Placed on Calendar  
 04/28/97 SENATE Placed on Special Order Calendar—SJ 00709  
 04/29/97 SENATE Placed on Special Order Calendar—SJ 00709, —SJ 00938  
 04/30/97 SENATE Placed on Special Order Calendar—SJ 00938, —SJ 01096  
 05/01/97 SENATE Placed on Special Order Calendar—SJ 00957, —SJ 01096  
 05/02/97 SENATE Placed on Special Order Calendar—SJ 01105, Died on Special Order Calendar
- S 1130 GENERAL BILL by Latvala (Identical CS/H 0249)**  
Drawings By Chance/Game Promotion, provides additional tax-exempt organizations which are authorized to conduct drawings by chance under specified provision, including civic organizations, employees' associations, clubs, fraternal benefit societies, fraternal lodges, & armed forces & veterans' organizations, amends provision which regulates game promotions in connection with sale of products or services, etc Amends 849 0935, 094 Effective Date Upon becoming law  
 03/03/97 SENATE Prefiled  
 03/12/97 SENATE Introduced, referred to Regulated Industries, Ways and Means—SJ 00143  
 03/17/97 SENATE On Committee agenda—Regulated Industries, 03/19/97, 2 00 pm, Room—EL  
 03/19/97 SENATE Comm Action Favorable by Regulated Industries—SJ 00277  
 03/20/97 SENATE Now in Ways and Means—SJ 00277  
 03/27/97 SENATE Withdrawn from Ways and Means—SJ 00287, Placed on Calendar  
 04/16/97 SENATE Placed on Special Order Calendar—SJ 00500  
 04/17/97 SENATE Placed on Special Order Calendar—SJ 00500  
 04/24/97 SENATE Placed on Special Order Calendar—SJ 00583  
 04/25/97 SENATE Placed on Special Order Calendar—SJ 00583  
 04/28/97 SENATE Placed on Special Order Calendar—SJ 00651, House Bill substituted—SJ 00701, Laid on Table, Iden /Sim / Compare Bill(s) passed, refer to CS/HB 249 (Ch 97-108)
- S 1132 GENERAL BILL/CS by Health Care; Casas (Compare 1ST ENG/H 1925)**  
Foreign-licensed Physicians/Exams, revises requirements for availability of examinations administered to certain foreign-licensed physicians Amends 458 3115 Effective Date 07/01/1997  
 03/03/97 SENATE Prefiled
- S 1132 (CONTINUED)**  
 03/12/97 SENATE Introduced, referred to Health Care, Ways and Means—SJ 00143  
 04/04/97 SENATE On Committee agenda—Health Care, 04/08/97, 2 00 pm, Room—EL  
 04/08/97 SENATE Comm Action CS by Health Care—SJ 00462, CS read first time on 04/10/97—SJ 00464  
 04/10/97 SENATE Now in Ways and Means—SJ 00462  
 04/24/97 SENATE Withdrawn from Ways and Means—SJ 00535, Placed on Calendar  
 04/28/97 SENATE Placed on Special Order Calendar—SJ 00709  
 04/29/97 SENATE Placed on Special Order Calendar—SJ 00709, —SJ 00938  
 04/30/97 SENATE Placed on Special Order Calendar—SJ 00938, —SJ 01096  
 05/01/97 SENATE Placed on Special Order Calendar—SJ 00957, —SJ 01096  
 05/02/97 SENATE Placed on Special Order Calendar—SJ 01105, Died on Special Order Calendar, Iden /Sim /Compare Bill(s) passed, refer to HB 1925 (Ch 97-261)
- S 1134 GENERAL BILL by Lee (Identical H 0359)**  
Invasive Exotic Plants/Public Land, revises provisions re DEP program to achieve eradication or maintenance control of invasive exotic plants on public lands Amends 369 252 Effective Date Upon becoming law  
 03/03/97 SENATE Prefiled  
 03/12/97 SENATE Introduced, referred to Natural Resources—SJ 00143  
 03/31/97 SENATE On Committee agenda—Natural Resources, 04/02/97, 2 30 pm, Room—A(LL-37)  
 04/02/97 SENATE Comm Action—Favorable by Natural Resources—SJ 00362  
 04/03/97 SENATE Placed on Calendar—SJ 00362  
 04/16/97 SENATE Placed on Special Order Calendar—SJ 00500, House Bill substituted—SJ 00496, Laid on Table, Iden /Sim / Compare Bill(s) passed, refer to HB 359 (Ch 97-38)
- S 1136 GENERAL BILL by Lee (Identical H 0931, Compare 1ST ENG/H 1411, CS/S 0818)**  
Nonprofit Corps /Attorney in Fact; (THIS BILL COMBINED IN CS/S818,1136,1242) authorizes certain corporations to act as attorney in fact, provides limitation Amends 709 08 Effective Date 07/01/1997  
 03/03/97 SENATE Prefiled  
 03/12/97 SENATE Introduced, referred to Judiciary—SJ 00143  
 03/17/97 SENATE On Committee agenda—Judiciary, 03/19/97, 2 00 pm, Room—1C(309)—Temporarily postponed  
 03/21/97 SENATE On Committee agenda—Judiciary, 03/25/97, 3 30 pm, Room—1C(309)—Not considered  
 03/28/97 SENATE On Committee agenda—Judiciary, 04/02/97, 2 30 pm, Room—1C(309)  
 04/02/97 SENATE CS combines this bill with 818 & 1242, Comm Action CS by Judiciary—SJ 00392, Original bill laid on Table, refer to combined CS/SB 818 (Laid on Table in Senate) Refer to HB 1411 (Ch 97-240)
- S 1138 GENERAL BILL by Casas**  
Food/Candy Containing Alcohol, revises provisions re sale of candy that contains alcohol, revises inspection requirements re sale of such candy Amends 500 10, 12 Effective Date 07/01/1997  
 03/03/97 SENATE Prefiled  
 03/12/97 SENATE Introduced, referred to Agriculture, Regulated Industries—SJ 00143  
 05/02/97 SENATE Died in Committee on Agriculture
- S 1140 GENERAL BILL by Klein**  
Prescription Drug Price Advertising, requires pharmacies to advertise their prescription drug retail price with comparison reference, provides for adoption of rules Effective Date 07/01/1997  
 03/03/97 SENATE Prefiled  
 03/12/97 SENATE Introduced, referred to Health Care—SJ 00143  
 05/02/97 SENATE Died in Committee on Health Care
- S 1142 GENERAL BILL by Klein (Identical H 0987)**  
HS Community Service Education, provides legislative findings, authorizes school districts to require 100 hours of community service education as condition for high school graduation, provides exceptions, provides components for high school community service education programs Creates 233 615 Effective Date 07/01/1997  
 03/03/97 SENATE Prefiled  
 03/12/97 SENATE Introduced, referred to Education, Ways and Means—SJ 00143  
 03/21/97 SENATE On Committee agenda—Education, 03/25/97, 12 30 pm, Room—A(LL-37)—Pending reconsideration  
 03/28/97 SENATE On Committee agenda—Education, 04/01/97, 2 30 pm, Room—A(LL-37)  
 04/01/97 SENATE Comm Action Unfavorable by Education, laid on Table—SJ 00362
- S 1144 GENERAL BILL/CS/1ST ENG by Governmental Reform and Oversight; Williams, (CO-SPONSORS) Sullivan (Compare H 1189, 2ND ENG/H 1835, H 1969, S 0254, CS/1ST ENG/S 1860, CS/1ST ENGS 2004)**

HISTORY OF SENATE BILLS

S 1235 (CONTINUED)

320 0821 Effective Date 10/01/1997  
 03/04/97 SENATE Filed  
 03/12/97 SENATE Introduced, referred to Transportation, Ways and Means -SJ 00149  
 03/13/97 SENATE On Committee agenda—Transportation, 03/17/97, 3 00 pm, Room—2C(301)  
 03/17/97 SENATE Comm Action CS by Transportation -SJ 00253, CS read first time on 03/20/97 -SJ 00264  
 03/20/97 SENATE Now in Ways and Means -SJ 00253, Withdrawn from Ways and Means -SJ 00249, Placed on Calendar  
 04/03/97 SENATE Placed on Special Order Calendar -SJ 00361  
 04/07/97 SENATE Placed on Special Order Calendar -SJ 00324, Read second time -SJ 00390, Amendment(s) adopted -SJ 00390, Ordered engrossed -SJ 00390  
 04/09/97 SENATE Read third time -SJ 00404, CS passed as amended, YEAS 37 NAYS 0 -SJ 00405, Immediately certified -SJ 00405  
 04/09/97 HOUSE In Messages, Received -HJ 00478  
 04/10/97 HOUSE Placed on Economic Impact Council Calendar -HJ 00478  
 04/17/97 HOUSE Placed on Consent Calendar, Substituted for CS/HB 527 -HJ 00600, Read second and third times -HJ 00600, CS passed, YEAS 112 NAYS 0 -HJ 00600  
 04/23/97 SENATE Ordered enrolled -SJ 00603  
 04/28/97 Signed by Officers and presented to Governor -SJ 00721  
 05/14/97 Became Law without Governor's Signature, Chapter No 97-58

S 1240 GENERAL BILL by Lee (Identical H 0643, Compare CS/2ND ENG/H 0419)

W S Badcock Blvd/SR 37/Lakeland, designates portion of State Road 37 as W S Badcock Boulevard, directs DOT to erect suitable markers Effective Date Upon becoming law  
 03/04/97 SENATE Filed  
 03/12/97 SENATE Introduced, referred to Transportation -SJ 00149  
 04/11/97 SENATE On Committee agenda—Transportation, 04/15/97, 9 00 am, Room—2C(301)  
 04/15/97 SENATE Comm Action -Favorable with 1 amendment(s) by Transportation -SJ 00521  
 04/16/97 SENATE Placed on Calendar -SJ 00521  
 05/02/97 SENATE Died on Calendar, Iden/Sim/Compare Bill(s) passed, refer to CS/HB 419 (Ch 97-318)

S 1242 GENERAL BILL by Dudley (Compare 1ST ENG/H 1411, CS/S 0818)

Administration of Estates/Expenses, (THIS BILL COMBINED IN CS/S818,1136,1242) provides liability of certain trusts for paying expenses of administering decedent's estate & enforceable claims of creditors, to extent that estate is insufficient to pay such claims Amends 733 707 Effective Date 07/01/1997  
 03/04/97 SENATE Filed  
 03/12/97 SENATE Introduced, referred to Judiciary -SJ 00149  
 03/17/97 SENATE On Committee agenda—Judiciary, 03/19/97, 2 00 pm, Room—1C(309)—Temporarily postponed  
 03/21/97 SENATE On Committee agenda—Judiciary, 03/25/97, 3 30 pm, Room—1C(309)—Not considered  
 03/28/97 SENATE On Committee agenda—Judiciary, 04/02/97, 2 30 pm, Room—1C(309)  
 04/02/97 SENATE CS combines this bill with 818 & 1136, Comm Action CS by Judiciary -SJ 00392, Original bill laid on Table, refer to combined CS/SB 818 (Laid on Table in Senate), Refer to HB 1411 (Ch 97-240)

S 1244 GENERAL BILL/CS by Ways and Means; Myers (Compare 2ND ENG/H 1357, H 1805, H 1929, CS/CS/S 0552, S 1960, S 2388)

Health Dept /Duties/Functions, clarifies agency responsibilities re certain child protection functions, requires consultation between agencies for certain functions, transfers certain powers, duties, functions, & assets of Children & Family Services Dept re child abuse & child protection to Health Dept, provides that Mental Health & Substance Abuse Div in Health Dept will be under supervision of Deputy Secretary for Behavioral Health Care, etc Amends FS Appropriation \$814,833 Effective Date 07/01/1997 except as otherwise provided.  
 03/04/97 SENATE Filed  
 03/12/97 SENATE Introduced, referred to Health Care, Commerce and Economic Opportunities, Governmental Reform and Oversight, Ways and Means -SJ 00149  
 03/21/97 SENATE On Committee agenda—Health Care 03/25/97, 12 30 pm, Room—EL  
 03/25/97 SENATE Comm Action Favorable by Health Care -SJ 00276  
 03/26/97 SENATE Now in Commerce and Economic Opportunities -SJ 00276  
 04/10/97 SENATE On Committee agenda—Commerce and Economic Opportunities, 04/14/97, 9 00 am, Room—EL  
 04/14/97 SENATE Comm Action Favorable with 1 amendment(s) by Commerce and Economic Opportunities -SJ 00500

S 1244 (CONTINUED)

04/15/97 SENATE Now in Governmental Reform and Oversight -SJ 00500, On Committee agenda—Governmental Reform and Oversight, 04/17/97, 4 00 pm, Room—1C(309)  
 04/17/97 SENATE Comm Action Favorable with 1 amendment(s) by Governmental Reform and Oversight -SJ 00584  
 04/18/97 SENATE Now in Ways and Means -SJ 00584, On Committee agenda—Ways and Means, 04/23/97, 2 00 pm, Room—EL  
 04/23/97 SENATE Comm Action -CS by Ways and Means -SJ 00651, CS read first time on 04/25/97 -SJ 00653  
 04/25/97 SENATE Placed on Calendar -SJ 00651  
 04/28/97 SENATE Placed on Special Order Calendar -SJ 00709  
 04/29/97 SENATE Placed on Special Order Calendar -SJ 00709, -SJ 00938  
 04/30/97 SENATE Placed on Special Order Calendar -SJ 00938, -SJ 01096  
 05/01/97 SENATE Placed on Special Order Calendar -SJ 00957, -SJ 01096  
 05/02/97 SENATE Placed on Special Order Calendar -SJ 01105, Died on Special Order Calendar, Iden/Sim/Compare Bill(s) passed, refer to HB 1357 (Ch 97-237)

S 1246 GENERAL BILL/CS by Governmental Reform and Oversight; Dudley (Similar 1ST ENG/H 1441)

State Minimum Building Codes, restricts contents of said codes Amends 553 73 Effective Date 05/30/1997  
 03/04/97 SENATE Filed  
 03/12/97 SENATE Introduced, referred to Governmental Reform and Oversight -SJ 00149  
 03/27/97 SENATE On Committee agenda—Governmental Reform and Oversight, 04/01/97, 2 00 pm, Room—1C(309)  
 04/01/97 SENATE Comm Action -CS by Governmental Reform and Oversight -SJ 00363, CS read first time on 04/03/97 -SJ 00375  
 04/03/97 SENATE Placed on Calendar -SJ 00363  
 04/24/97 SENATE Placed on Special Order Calendar -SJ 00583, Read second time -SJ 00544, Amendment(s) failed -SJ 00544  
 04/25/97 SENATE Read third time -SJ 00610, CS passed, YEAS 35 NAYS 2 -SJ 00610, Immediately certified -SJ 00610  
 04/25/97 HOUSE In Messages  
 04/28/97 HOUSE Received -HJ 01121, Fiscal Responsibility Council in Daily Folder -HJ 01121  
 04/29/97 HOUSE Read second time -HJ 01182  
 04/30/97 HOUSE Temporarily postponed, on Third Reading -HJ 01224, Read third time -HJ 01249, CS passed, YEAS 73 NAYS 44 -HJ 01249  
 04/30/97 SENATE Ordered enrolled -SJ 01103  
 05/14/97 Signed by Officers and presented to Governor  
 05/30/97 Became Law without Governor's Signature, Chapter No 97-177

S 1248 GENERAL BILL/CS by Community Affairs; Dudley (Similar 1ST ENG/H 1741, Compare H 0421, H 0423, 2ND ENG/H 0425, H 0429, H 0567, 1ST ENG/H 0619, 1ST ENG/H 0927, S 0740, S 0742, S 0744, S 0906, S 0994, S 1894, S 1896)

Independent Fire Control Districts, creates Independent Special Fire Control District Act, prescribes uniform criteria for operation of such districts, pre-empts certain special acts & general acts of local application, exempts district assets & property from taxation, provides requirements & procedures for issuance of bonds, provides penalties for failure to obey orders or directions of fire dept members at scene of rescue operations or other emergencies, etc Amends 316 072 Effective Date Upon becoming law  
 03/04/97 SENATE Filed  
 03/12/97 SENATE Introduced, referred to Community Affairs, Governmental Reform and Oversight, Ways and Means -SJ 00149  
 03/28/97 SENATE On Committee agenda—Community Affairs, 04/01/97, 9 00 am, Room—1C(309)—Not considered  
 04/04/97 SENATE On Committee agenda—Community Affairs, 04/08/97, 9 00 am, Room—1C(309)  
 04/08/97 SENATE Comm Action CS by Community Affairs -SJ 00462, CS read first time on 04/10/97 -SJ 00464  
 04/10/97 SENATE Now in Governmental Reform and Oversight -SJ 00462, On Committee agenda—Governmental Reform and Oversight, 04/14/97, 1 00 pm, Room—1C(309)  
 04/14/97 SENATE Comm Action Favorable by Governmental Reform and Oversight -SJ 00500  
 04/15/97 SENATE Now in Ways and Means -SJ 00500  
 04/17/97 SENATE Withdrawn from Ways and Means -SJ 00509, Placed on Calendar  
 04/28/97 SENATE Placed on Special Order Calendar -SJ 00709  
 04/29/97 SENATE Placed on Special Order Calendar -SJ 00709, -SJ 00938  
 04/30/97 SENATE Placed on Special Order Calendar -SJ 00938, -SJ 01096  
 05/01/97 SENATE Placed on Consent Calendar -SJ 01294, House Bill substituted -SJ 01125, Laid on Table, Iden/Sim/Compare Bill(s) passed, refer to HB 1741 (Ch 97-256), See also HB 927 (Ch 97-340)

S 1250 GENERAL BILL/CS by Education, Dudley (Similar CS/H 1327)

Student Grant & Loan Program, establishes Florida Supplemental Student Grant & Loan Program provides for administration & rules, provides for stu-

By Representative Bloom

1 A bill to be entitled

2 An act relating to the administration of trusts  
3 and estates; amending s. 689.225, F.S.;  
4 providing a statement of the rule against  
5 perpetuities; amending s. 709.08, F.S.;  
6 authorizing certain corporations to serve as an  
7 attorney in fact; amending s. 733.707, F.S.;  
8 defining the term "right of revocation" with  
9 respect to the order of payment of expenses and  
10 obligations of an estate; amending s. 737.111,  
11 F.S.; revising language with respect to  
12 execution requirements for express trusts;  
13 providing for the application of the section;  
14 amending s. 737.2041, F.S., relating to  
15 trustee's attorney's fee; revising procedures  
16 for determining attorney's fees; providing for  
17 determining fees for an attorney who is  
18 retained for limited services; revising the  
19 list of services that constitute ordinary  
20 services in an initial trust administration;  
21 deleting an exception from the applicability of  
22 presumptive fees for a corporate fiduciary that  
23 serves as a trustee or cotrustee; amending s.  
24 737.303, F.S.; revising language with respect  
25 to the duty of the trustee to inform and  
26 account to beneficiaries to require information  
27 to the grantor with respect to certain trusts;  
28 amending s. 737.308, F.S.; revising a provision  
29 of law governing notice of trust to provide  
30 that the clerk shall send a copy of any caveat  
31 filed regarding the settlor to the trustee, and

1 the notice of trust to the caveator; providing  
2 an exception; amending s. 733.817, F.S.;  
3 revising provisions of law with respect to the  
4 apportionment of estate taxes; amending s.  
5 738.12, F.S.; providing conditions under which  
6 a trust beneficiary is considered an income  
7 beneficiary; providing an effective date.  
8

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

10  
11 Section 1. Paragraph (e) is added to subsection (2) of  
12 section 689.225, Florida Statutes, to read:

13 689.225 Statutory rule against perpetuities.--

14 (2) STATEMENT OF THE RULE.--

15 (e) Language in a governing instrument is inoperative  
16 to the extent that it produces a period of time that exceeds  
17 21 years after the death of the survivor of the specified  
18 lives, if, in measuring a period from the creation of a trust  
19 or other property arrangement, that language seeks to disallow  
20 the vesting or termination of any interest or trust beyond,  
21 seeks to postpone the vesting or termination of any interest  
22 or trust until, or seeks to operate in effect in any similar  
23 fashion upon, the later of:

24 1. The expiration of a period of time not exceeding 21  
25 years after the death of a specified life or the survivor of  
26 specified lives, or upon the death of a specified life or the  
27 death of the survivor of specified lives in being at the  
28 creation of the trust or other property arrangement; or

29 2. The expiration of a period of time that exceeds or  
30 might exceed 21 years after the death of the survivor of lives  
31

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1 in being at the creation of the trust or other property  
2 arrangement.

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

5 709.08 Durable power of attorney.--

6 (2) WHO MAY SERVE AS ATTORNEY IN FACT.--The attorney  
7 in fact must be a natural person who is 18 years of age or  
8 older and is of sound mind, or a financial institution, as  
9 defined in chapter 655, with trust powers, having a place of  
10 business in this state and authorized to conduct trust  
11 business in this state. A not-for-profit corporation,  
12 organized for charitable or religious purposes in this state,  
13 which has qualified as a court-appointed guardian prior to  
14 January 1, 1996, and which is a tax-exempt organization under  
15 26 U.S.C. s. 501(c)(3), may also act as an attorney in fact.  
16 Notwithstanding any contrary clause in the written power of  
17 attorney, no assets of the principal may be used for the  
18 benefit of the corporate attorney in fact, or its officers or  
19 directors.

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

22 733.707 Order of payment of expenses and  
23 obligations.--

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

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

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

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

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

28 (e) For purposes of this subsection, a "right of  
29 revocation" is a power retained by the decedent, held in any  
30 capacity, to:  
31

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

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

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

7           737.111 Execution requirements for express trusts.--

8           (1) The testamentary aspects of a trust defined in s.  
9 731.201(33), are invalid unless the trust instrument is  
10 executed by the settlor with the formalities required for the  
11 execution of a will.

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

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

21           (4) For the purposes of this section, the term  
22 "testamentary aspects" means those provisions of the trust  
23 that dispose of the trust property on or after the death of  
24 the settlor other than to the settlor's estate.

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

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

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

5           737.2041 Trustee's attorney's fees.--

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

22           ~~{2}--The attorney; the trustee; and persons bearing the~~  
23 ~~impact of the compensation may agree to compensation~~  
24 ~~determined in a different manner than provided in this~~  
25 ~~section:~~

26           (2){3} Unless otherwise agreed, compensation for  
27 ordinary services based upon the value of the trust assets  
28 immediately following the settlor's death and the income  
29 earned by the trust during initial administration at the rate  
30 of 75 percent of the schedule provided in s  
31 733.6171(3)(a)-(h) is presumed to be reasonable total

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1 compensation for ordinary services of all attorneys employed  
2 generally to advise trustees concerning their duties in  
3 initial trust administration.

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

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

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

16 (b) Implementation of substitution of the successor  
17 trustee.

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

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

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

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

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

30 (h) The trustee's obligation to inform and account to  
31 beneficiaries and the method of satisfaction of these

1 obligations; the liability of the trust and trustee to the  
2 settlor's creditors; the advisability or necessity for probate  
3 proceedings to bar creditors; and the contribution  
4 requirements to the settlor's probate estate.

5 ~~(i)~~--Creditor-procedures-and-direct-payment-or  
6 ~~compromise-and-satisfaction-of-claims-against-the-trust~~  
7 ~~assets:~~

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

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

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

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

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

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

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

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

4           ~~(5) When a corporate fiduciary is serving as trustee~~  
5 ~~or cotrustee of a trust described in s. 733.707(3); the~~  
6 ~~presumptive fee for ordinary services and the list of what~~  
7 ~~constitutes ordinary services in subsections (3) and (4) shall~~  
8 ~~not apply; and what constitutes ordinary services and~~  
9 ~~reasonable compensation for these services shall instead be~~  
10 ~~determined under the particular facts and circumstances~~  
11 ~~applicable to that trust. In addition to the attorney's fees~~  
12 ~~for ordinary services, the attorney for the trustee shall be~~  
13 ~~allowed further reasonable compensation for any extraordinary~~  
14 ~~service. What is an extraordinary service may vary depending~~  
5 on many factors, including the size of the trust.

16 Extraordinary services may include, but are not limited to:

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

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

25           (c) Tax advice on postmortem tax planning, including,  
26 but not limited to, disclaimer, renunciation of fiduciary  
27 commission, alternate valuation date, allocation of  
28 administrative expenses between tax returns, the QTIP or  
29 reverse QTIP election, allocation of GST exemption,  
30 qualification for Internal Revenue Code ss. 303 and 6166  
31 privileges, deduction of last illness expenses, distribution

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1 planning, asset basis considerations, throwback rules,  
2 handling income or deductions in respect of a decedent,  
3 valuation discounts, special use and other valuation, handling  
4 employee benefit or retirement proceeds, prompt assessment  
5 request, or request for release of personal liability for  
6 payment of tax.

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

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

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

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

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

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

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

31

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

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

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

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

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

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

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

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

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

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

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1 (i) Any other relevant factors.

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

9 (8) If a separate written agreement regarding  
10 compensation exists between the attorney and the settlor, the  
11 attorney shall furnish a copy to the trustee prior to  
12 commencement of employment and, if employed, shall promptly  
13 file and serve a copy on all interested persons. Neither a  
14 separate agreement nor a provision in the trust suggesting or  
15 directing the trustee to retain a specific attorney will  
16 obligate the trustee to employ the attorney or obligate the  
17 attorney to accept the representation, but if the attorney who  
18 is a party to the agreement or who drafted the trust is  
19 employed, the compensation paid shall not exceed the  
20 compensation provided in the agreement.

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

28 (10) "Initial trust administration" as used in this  
29 section means administration of a trust described in s.  
30 733.707(3) during the period which begins with the death of  
31 the settlor and ends upon the final distribution of trust

1 assets outright or to continuing trusts created under the  
2 trust agreement, but if an estate tax return is required, not  
3 until after issuance of an estate tax closing letter or other  
4 evidence of termination of the estate tax proceeding. This  
5 initial period is not intended to include continued regular  
6 administration of the trust.

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

9 Section 6. Paragraph (c) of subsection (4) of section  
10 737.303, Florida Statutes, is amended to read:

11 737.303 Duty to inform and account to  
12 beneficiaries.--The trustee shall keep the beneficiaries of  
13 the trust reasonably informed of the trust and its  
14 administration. The trustee's duty to inform and account  
15 includes, but is not limited to, the following:

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

20 Section 7. Subsections (5), (6), and (7) of section  
21 737.308, Florida Statutes, are renumbered as subsections (6),  
22 (7), and (8), respectively, and a new subsection (5) is added  
23 to said section to read:

24 737.308 Notice of trust.--

25 (5) The clerk shall send a copy of:

26 (a) Any caveat filed regarding the settlor to the  
27 trustee; and

28 (b) The notice of trust to any caveator, unless there  
29 is a probate proceeding pending and the personal  
30 representative and the trustee are the same.

31

1 Section 8. Section 733.817, Florida Statutes, is  
2 amended to read:

3 (Substantial rewording of section. See  
4 s. 733.817, F.S., for present text.)  
5 733.817 Apportionment of estate taxes.--

6 (1) For purposes of this section:

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

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

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

22 (d) "Included in the measure of the tax" means that  
23 for each separate tax that an interest may incur, only  
24 interests included in the measure of that particular tax are  
25 considered. The term "included in the measure of the tax" does  
26 not include any interest, whether passing under the will or  
27 not, to the extent the interest is initially deductible from  
28 the gross estate, without regard to any subsequent diminution  
29 of the deduction by reason of the charge of any part of the  
30 applicable tax to the interest. The term "included in the  
31 measure of the tax" does not include interests or amounts that

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1 are not included in the gross estate but are included in the  
2 amount upon which the applicable tax is computed, such as  
3 adjusted taxable gifts with respect to the federal estate tax.  
4 If an election is required for deductibility, an interest is  
5 not "initially deductible" unless the election for  
6 deductibility is allowed.

7 (e) "Internal Revenue Code" means the Internal Revenue  
8 Code of 1986, as amended from time to time.

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

16 (g) "Nonresiduary devise" means any devise that is not  
17 a residuary devise.

18 (h) "Nonresiduary interest" in connection with a trust  
19 means any interest in a trust which is not a residuary  
20 interest.

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

30 (j) "Residuary devise" has the meaning set forth in s.  
31 731.201(30).

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

6       (l) "Revocable trust" means a trust as defined in s.  
7 731.201(33) created by the decedent to the extent that the  
8 decedent had at his or her death the power to alter, amend, or  
9 revoke the trust either alone or in conjunction with any other  
10 person.

11       (m) "State" means any state, territory, or possession  
12 of the United States, the District of Columbia, and the  
13 Commonwealth of Puerto Rico.

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

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

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

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

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

14           (3) The net tax attributable to the interests included  
15 in the measure of each tax shall be determined by the  
16 proportion that the value of each interest included in the  
17 measure of the tax bears to the total value of all interests  
18 included in the measure of the tax. Notwithstanding the  
19 foregoing:

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

27           (b) The foreign tax credit allowed with respect to the  
28 federal estate tax shall be allocated among the recipients of  
29 interests finally charged with the payment of the foreign tax  
30 in reduction of any federal estate tax chargeable to the  
31 recipients of the foreign interests, whether or not any

1 federal estate tax is attributable to the foreign interests.  
2 Any excess of the foreign tax credit shall be applied to  
3 reduce proportionately the net amount of federal estate tax  
4 chargeable to the remaining recipients of the interests  
5 included in the measure of the federal estate tax.

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

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

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

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

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

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

29 (4)(a) Except as otherwise effectively directed by the  
30 governing instrument, if the Internal Revenue Code including,  
31 but not limited to, ss. 2032A(c)(5), 2206, 2207, 2207A, 2207B,

1 and 2603 of the Internal Revenue Code applies to apportion  
2 federal tax against recipients of certain interests, all net  
3 taxes, including taxes levied by the state attributable to  
4 each type of interest, shall be apportioned against the  
5 recipients of all interests of that type in the proportion  
6 that the value of each interest of that type included in the  
7 measure of the tax bears to the total of all interests of that  
8 type included in the measure of the tax.

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

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

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

17 1. The net tax attributable to nonresiduary devisees  
18 shall be charged to and paid from the residuary estate whether  
19 or not all interests in the residuary estate are included in  
20 the measure of the tax. If the residuary estate is  
21 insufficient to pay the net tax attributable to all  
22 nonresiduary devisees, the balance of the net tax attributable  
23 to nonresiduary devisees shall be apportioned among the  
24 recipients of the nonresiduary devisees in the proportion that  
25 the value of each nonresiduary devise included in the measure  
26 of the tax bears to the total of all nonresiduary devisees  
27 included in the measure of the tax.

28 2. The net tax attributable to residuary devisees shall  
29 be apportioned among the recipients of the residuary devisees  
30 included in the measure of tax in the proportion that the  
31 value of each residuary devise included in the measure of the

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1 tax bears to the total of all residuary devises included in  
2 the measure of the tax.

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

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

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

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

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

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

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

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

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

23           (f) The net tax that is not apportioned under  
24 paragraphs (e), (b), and (c), including, but not limited to,  
25 the net tax attributable to interests passing by intestacy,  
26 jointly held interests passing by survivorship, insurance,  
27 properties in which the decedent held a reversionary or  
28 revocable interest, and annuities, shall be apportioned among  
29 the recipients of the remaining interests that are included in  
30 the measure of the tax in the proportion that the value of  
31

1 each such interest bears to the total value of all the  
2 remaining interests included in the measure of the tax.

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

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

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

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

22 4. For a direction in a governing instrument to be  
23 effective to direct payment of taxes attributable to property  
24 not passing under the governing instrument from property  
25 passing under the governing instrument, the governing  
26 instrument must expressly refer to this section, or expressly  
27 indicate that the property passing under the governing  
28 instrument is to bear the burden of taxation for property not  
29 passing under the governing instrument. A direction in the  
30 governing instrument to the effect that all taxes are to be  
31 paid from property passing under the governing instrument

1 whether attributable to property passing under the governing  
2 instrument or otherwise shall be effective to direct the  
3 payment from property passing under the governing instrument  
4 of taxes attributable to property not passing under the  
5 governing instrument.

6 5. If there is a conflict as to payment of taxes  
7 between the decedent's will and the governing instrument, the  
8 decedent's will controls, except as follows:

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

12 b. A direction in a governing instrument to pay the  
13 tax attributable to assets that pass pursuant to the governing  
14 instrument from assets that pass pursuant to that governing  
15 instrument shall be effective notwithstanding any conflict  
16 with the decedent's will, unless the tax provision in the  
17 decedent's will expressly overrides the conflicting provision  
18 in the governing instrument.

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

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

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

18       (8)(a) If the personal representative or fiduciary  
19 does not have possession of sufficient property otherwise  
20 distributable to the recipient to pay the tax apportioned to  
21 the recipient, whether under this section, the Internal  
22 Revenue Code, or the governing instrument, if applicable, the  
23 personal representative or fiduciary shall recover the  
24 deficiency in tax so apportioned to the recipient;

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

27       2. To the extent of any deficiency in collection from  
28 the fiduciary, or to the extent collection from the fiduciary  
29 is excused pursuant to subsection (9) and in all other cases,  
30 from the recipient of the property to which the tax is  
31

1 apportioned, unless relieved of this duty as provided in  
2 subsection (9).

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

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

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

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

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

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

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

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

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

9           **(11) Nothing in this section shall limit the right of**  
10 **any person who has paid more than the amount of the tax**  
11 **apportionable to such person, calculated as if all apportioned**  
12 **amounts would be collected, to obtain contribution from those**  
13 **who have not paid the full amount of the tax apportionable to**  
14 **them, calculated as if all apportioned amounts would be**  
15 **collected, and that right is hereby conferred. In any action**  
16 **to enforce contribution, the court shall award taxable costs**  
17 **as in chancery actions, including reasonable attorney's fees.**

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

24           Section 9. Section 738.12, Florida Statutes, is  
25 amended to read:

26           738.12 Underproductive property.--

27           **(1)(a) If the total principal of a trust does not in**  
28 **any year yield a net income of at least 3 percent of its**  
29 **market value (including as income the value of any beneficial**  
30 **use of the property by the income beneficiary), the trustee**  
31 **shall pay to the income beneficiary an amount equal to the**

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1 excess of 3 percent of the value of the principal, based upon  
2 the market value at the beginning of the calendar year, over  
3 the trust income paid to the income beneficiary in that year.  
4 This amount shall be paid to the income beneficiary using the  
5 first principal cash available.

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

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

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

23 ~~(3)--If-by-the-terms-of-the-trust-any-portion-of-the~~  
24 ~~income-is-to-be-retained-by-the-trustee-or-disposed-of-other~~  
25 ~~than-by-payment-to-an-income-beneficiary;-such-portion-of-the~~  
26 ~~amount-determined-in-subsection-(1)-shall-be-retained-or~~  
27 ~~disposed-of-as-provided-by-the-terms-of-the-trust;~~

28 Section 10. This act shall take effect upon becoming a  
29 law, except that section 8 of this act shall take effect  
30 October 1, 1998, and shall apply to the estates of decedents  
31 dying on or after October 1, 1998, and section 9 of this act

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1 shall take effect upon becoming law and shall be applicable to  
2 all trusts, whenever executed.

3  
4 \*\*\*\*\*

5 HOUSE SUMMARY

6 Provides a statement of the rule against perpetuities.  
7 Modifies various statutes regulating the administration  
8 of trusts and estates. Authorizes a not-for-profit  
9 corporation organized for charitable or religious  
10 purposes in this state which has qualified as a  
11 court-appointed guardian prior to January 1, 1996, and is  
12 a tax-exempt organization to act as an attorney in fact.  
13 Defines the term "right of revocation" for purposes of  
14 the priority given to the payment of expenses and  
15 obligations of a deceased's estate. Revises prescribed  
16 requirements for the execution of an expressed trust.  
17 Authorizes the trustee of a trust and an attorney to  
18 agree to the compensation to be paid to the attorney in  
19 an amount different from the amount prescribed in s.  
20 737.2041, F.S., for services related to the initial  
21 administration of a trust specified in s. 737.707(3),  
22 F.S. Provides for determining fees for an attorney who is  
23 retained for limited services. Revises a provision of  
24 law governing notice of trust to provide that the clerk  
25 shall send a copy of any caveat filed regarding the  
26 settlor to the trustee and a copy of the notice of trust  
27 to the caveator. Revises the list of services of an  
28 attorney which constitute ordinary services in an initial  
29 trust administration. Deletes an exception from the  
30 applicability of presumptive fees for a corporate  
31 fiduciary serving as a trustee or cotrustee. Revises the  
duty of a trustee to inform and account to beneficiaries  
of trusts specified in s. 733.707(3), F.S. Revises  
provisions relating to the apportionment of estate taxes.  
Provides conditions under which a trust beneficiary is  
considered an income beneficiary.

STORAGE NAME: h1411.rpp  
DATE: April 12, 1997

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
REAL PROPERTY & PROBATE  
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

**BILL #:** HB 1411

**RELATING TO:** The Administration of Trusts and Estates

**SPONSOR(S):** Representative Bloom

**STATUTE(S) AFFECTED:** Amending sections 689.255, 709.08, 733.707, 737.111, 737.2041, 737.303, 737.308, 733.817, and 738.12, Florida Statutes

**COMPANION BILL(S):** CS/SB's 818, 1136, & 1242

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE**

- (1) REAL PROPERTY & PROBATE
  - (2)
  - (3)
  - (4)
  - (5)
- 

**I. SUMMARY**

HB 1411 makes the following changes relating to the administration of trusts and estates

- amends the rule against perpetuities;
- amends the durable power of attorney statute to permit certain not-for-profit corporations to act as an attorney in fact,
- provides a definition of revocable trusts,
- clarifies the effective date for the trust execution changes effective October 1, 1995, and also clarifies that the provisions of this section do not apply to specified retirement plans;
- amends provision relating to attorney's fees in representing a trustee,
- removes the words "or beneficiary" from section 737.303(4)(c), Florida Statutes;
- requires the clerk to send a copy of any caveat filed 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,
- substantial rewording and amendment to section 733.817, Florida Statutes, relating to apportionment of estate taxes, in order to align the state and federal tax codes
- section 738.12, Florida Statutes, relating to underproductive property, is amended to provide that a beneficiary is an income beneficiary only if the trust instrument is irrevocable and requires that the net income from the trust be paid to the beneficiary

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after

October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed

This bill should not have a fiscal impact on state or local governments.

## II SUBSTANTIVE RESEARCH:

### A. PRESENT SITUATION

#### **Rule Against Perpetuities**

Section 689.225, Florida Statutes, is the "Florida Uniform Statutory Rule Against Perpetuities." Subsection (2) provides a statement of the rule.

A nonvested property interest in real or personal property is invalid unless when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or the interest either vests or terminates within 90 years after its creation

A general power of appointment not presently exercisable because of a condition precedent is invalid unless: when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

A nongeneral power of appointment or a general testamentary power of appointment is invalid unless: when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

In determining whether a nonvested property interest or a power of appointment is valid, the possibility that a child will be born to an individual after the individual's death is disregarded

#### **Probate**

Section 733.707, Florida Statutes, provides for the personal representative's payment of the expenses of the administration and obligations of the estate. Section 733.707(3), Florida Statutes, provides that 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 (c)*, 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 Paragraph (c) contains no definitions During the 1995 Legislative session, this section of law was amended. There were two floor amendments to the bill relating to this section. One of those amendments would have change the reference to paragraph (c), to a reference to paragraph (e), and would have inserted the definition However, due to an overlap in the amendments this change did not occur.

Section 733 707(3)(a), Florida Statutes, provides that, for purposes of subsection (3), 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, are not to be considered a trust over which the decedent has a right of revocation.

Section 737 111, Florida Statutes, was enacted in 1995 and took effect October 1, 1995. Ch. 95-401, s. 11, at 3287, Laws of Fla. The section provides that the testamentary aspects of a trust are invalid unless the trust is executed with the formalities required for the execution of a will. Also, the testamentary aspects of an amendment to a trust are invalid unless the amendment is executed with the same formalities as are required for a will. For the purposes of this section, the term "testamentary aspects" means those provisions of the trust that dispose of the trust property on the death of the settlor other than to the settlor's estate. This provision was intended to be prospective only. However, many residents of the state have contacted the House of Representatives after the enactment of this provision, complaining that their attorney's are advising them that their trusts are invalid unless they are re-executed with the formalities required for the execution of a will.

Section 737 303, Florida Statutes, sets out the duty of a trustee to inform and account to beneficiaries. The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. A beneficiary is entitled to a statement of the accounts of the trust annually and upon termination of the trust or upon change of the trustee except that, in the case of a trust described in s. 733.707(3), Florida Statutes, the trustee's duties extend only to the grantor or beneficiary or the legal representative of the grantor or beneficiary during the grantor's lifetime. Section 737.303(4)(e), Florida Statutes, provides that all rights which the section provides to a beneficiary may be asserted by a legal representative or natural guardian of the beneficiary. Notice of the trustee's acceptance of the trust and the statement of accounts provided to a representative of the beneficiary binds the beneficiary.

Section 737.308, Florida Statutes, requires that, upon the death of a settlor of a trust described in s 737 707(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. The clerk must 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. The clerk is required to notify the trustee of any probate proceeding and to notify the personal representative of the notice of trust. However, if there is no probate proceeding, but a trust exists and there are caveators, there is no requirement that the clerk send a notice of trust to the caveators, nor must the clerk send the trustee copies of the caveats.

### **Durable Power of Attorney**

Prior to October 1, 1995, the durable power of attorney statute did not prescribe or limit who could serve as an attorney in fact. As amended in 1995, section 709 08(2), Florida Statutes, limits who can serve to either 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. Ch. 95-401, s. 17, at 3292, Laws of Fla

### **Trustee's Attorney's Fees**

Section 737.2041, Florida Statutes, provides that the attorney retained by the trustee of a trust described in s. 733 707(3), Florida Statutes, is entitled to reasonable compensation for legal services rendered in the initial administration of the trust payable from the assets of the trust without court order. 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.

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 section 733.6171(3)(a)-(h), Florida Statutes, is presumed to be reasonable compensation for attorneys in initial trust administration. This section provides that ordinary services of the attorney for a trustee include legal advice and representation relating to a list of possible duties of the trustee

When a corporate fiduciary is serving as trustee or cotrustee, the presumptive fee for ordinary services and the list of what constitutes ordinary services does not apply, and what constitutes ordinary services and reasonable compensation for those services is instead 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 is allowed further reasonable compensation for any extraordinary service. What constitutes an extraordinary service may vary depending on many factors, including the size of the trust. The statute sets forth a list of some services which constitute extraordinary services

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 is to consider all of a list of factors set forth in the section, giving such weight to each as it may determine to be appropriate

### **Apportionment of Estate Tax**

Section 733.817, Florida Statutes, provides for apportionment of estate taxes. Any estate or other death tax shall be apportioned in the following manner:

If a part of the estate passed under a will by reference to a specific property or in any other nonresiduary form, exclusive of property over which the decedent had a power of appointment as defined from time to time under the estate tax laws of the United States, the net amount of the tax attributable to it shall be charged to and paid from the residuary estate without requiring contribution from persons receiving the interests, except as otherwise directed by the governing instrument. In the event the residuary estate is insufficient to pay the tax attributable to the interests, any balance of the tax

shall be equitably apportioned among the recipients of the interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interests so included, except as otherwise directed by the governing instrument

If a part of the estate passed under the will as a residuary interest, exclusive of property over which the decedent had power of appointment, the net amount of tax attributable to it shall be equitably apportioned among the residuary beneficiaries in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests so included, except as otherwise directed by the governing instrument. When a residuary interest is a temporary interest, the tax attributable to it shall be charged to corpus and not apportioned between temporary and remainder interests

If a part of the property concerning which the tax is levied or assessed is held under the terms of any trust created inter vivos, then, unless the governing instrument directs otherwise:

If any portion of the trust is directed to pass or to be held in further trust by reference to a specific property, or type of property, fund, sum, or statutory amount, or in any other nonresiduary form, the net amount of the tax attributable to that portion must be charged to and paid from the corpus of the residuary share of the trust without requiring contribution from the nonresiduary interest or the persons receiving or benefiting from that interest. If the residuary portion of the trust is insufficient to pay the tax attributable to all nonresiduary interests, any balance of the tax must be equitably apportioned among the recipients of those interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interest so included.

The net amount of the tax directly attributable to the residuary share of the trust, if any, must be charged as follows: the net amount of the tax attributable to each residuary temporary interest must be charged to that portion of residuary principal that supports the temporary interest without apportionment, and the net amount of the tax attributable to the balance of the residuary share must be equitably apportioned among the residuary beneficiaries, by charge to the corpus of their interest in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests included.

Real property or mobile home homesteads that are exempt from execution by law shall be exempt from apportionment of taxes. Persons taking an interest in the homesteads shall not be liable for apportionment of taxes on account of the homesteads. The net amount of the tax attributable to homestead property shall be paid from other assets of any trust or the estate subject to administration in the order as directed by the governing instrument or, absent this direction, in the following order:

Property not disposed of by the will or trust.

Property passing as the residuary estate.

Property not specifically or demonstratively devised.

Property specifically or demonstratively devised.

The balance of the net amount of the tax shall be equitably apportioned among, and paid by, the recipients and beneficiaries of the properties or interests, in the proportion that the value of the property or interest of each included in the measure of the tax bears to the total value of all the properties and interests included in the measure of the tax, except as otherwise directed by the governing instrument. With respect to a temporary interest not in trust, the amount charged to the recipients or beneficiaries shall not be apportioned between temporary and remainder interests but shall be charged to and paid out of the corpus of the property or fund, except as otherwise directed by the governing instrument.

Nothing contained in this section shall be construed to require the personal representative or other concerned fiduciary to pay any estate, inheritance, or other death taxes levied or assessed by any foreign country, unless specific directions to that effect are contained in the will or other instrument under which the fiduciary is acting

A direction against apportionment under this section may be explicit or implicit from the terms of the governing instrument, but must be clear and unequivocal, provided, however, that an implicit direction against apportionment is not sufficient to avoid the apportionment under state or applicable federal law unless the court also finds that the testator considered and made a deliberate and informed decision about the burden of taxation

No personal representative or other fiduciary shall be required to transfer any property until the amount of any tax due from the transferee is paid or, if the apportionment of tax has not been determined, until adequate security is furnished for the payment. The fiduciary shall not be required to distribute assets that he reasonably anticipates may be necessary to pay any state or federal taxes.

After the amount of all estate, inheritance, and death taxes is finally determined, the personal representative or other fiduciary shall petition for an order of apportionment and shall give formal notice of the petition and the hearing to all interested persons.

### **Underproductive Property**

Section 738 12, Florida Statutes, provides for underproductive trust property. 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 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year. This amount shall be paid to the income beneficiary using the first principal cash available.

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. Upon the sale of the property the income beneficiary shall not be entitled to any portion of the proceeds of sale, except any amount previously owing and unpaid from the 3 percent of principal computation above sale shall be paid therefrom

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 the 3 percent of principal computation above shall be retained or disposed of as provided by the terms of the trust.

## **B EFFECT OF PROPOSED CHANGES:**

HB 1411 makes several changes relating to the administration of trusts and estates. The bill amends the rule against perpetuities, to provide that certain language in a governing instrument is inoperative to the extent that it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives, if in measuring a period from the creation of a trust or other property arrangement, the provision operates according to the specified subparagraphs.

The bill amends the durable power of attorney statute to permit certain not-for-profit corporations to act as an attorney in fact. A definition of revocable trusts which was inadvertently left out of the 1995 Legislation, is provided in the bill. The bill clarifies the effective date for the trust execution changes effective October 1, 1995, and also clarifies that the provisions of this section do not apply to specified retirement plans. The bill corrects a glitch, removing the words "or beneficiary" from section 737.303(4)(c), Florida Statutes.

The bill amends provision relating to attorney's fees in representing a trustee.

The bill requires the clerk to send a copy of any caveat filed 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. This fills a void with regard to a lack of notice when there is no probate estate, yet there are creditors, and a trust from which the creditors may be able to recover.

The bill substantially rewords and amends section 733.817, Florida Statutes, relating to apportionment of estate taxes, in order to align the state and federal tax codes. This section applies only if the will does not provide for the handling of taxes.

Section 738.12, Florida Statutes, relating to underproductive property, is amended to provide that a beneficiary is 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.

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed.

## **C APPLICATION OF PRINCIPLES:**

1. Less Government:

a Does the bill create, increase or reduce, either directly or indirectly.

(1) any authority to make rules or adjudicate disputes?

The bill changes the law relating to trusts and estate administration. This will have an affect on disputes in this area

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The bill requires clerks of court to send a copy of any caveat filed to the trustee and the notice of trust to any caveator, unless a probate proceeding is pending and the personal representative and the trustee are the same. Current law does not require this

(3) any entitlement to a government service or benefit?

See (2) above

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a Does the bill increase anyone's taxes?

No.

b Does the bill require or authorize an increase in any fees?

No

c. Does the bill reduce total taxes, both rates and revenues?

No.

d Does the bill reduce total fees, both rates and revenues?

No.

e Does the bill authorize any fee or tax increase by any local government?

No

3 Personal Responsibility

a Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No

4. Individual Freedom:

a Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill permits certain not-for-profit corporations to act as an attorney in fact This will permit individuals to seek assistance from these corporations through a durable power of attorney This is not currently available

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5 Family Empowerment.

a If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

The bill effects trusts and estates and the beneficiaries of trusts and estates, therefore, it does effect rights and obligations between family members as specified

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

## D SECTION-BY-SECTION RESEARCH

### Section 1.

Section 689.225(2), Florida Statutes, relating to the rule against perpetuities, is amended to provide that language in a governing instrument is inoperative to the extent that it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives, if, in measuring a period from the creation of a trust or other property arrangement, that language seeks to disallow the vesting or termination of any interest or trust beyond, seeks to postpone the vesting or termination of any interest or trust until, or seeks to operate in effect in any similar fashion upon, the later of

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

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.

The new language is intended to coordinate with the Internal Revenue Service (IRS) position with respect to application of generation skipping transfer tax issues to trusts. The generation skipping tax provisions of the IRS were adopted in Florida in 1995.

### Section 2.

The bill amends section 709.08, Florida Statutes, to provide that a not-for-profit corporation, organized for charitable or religious purposes, which has qualified as a court-appointed guardian prior to January 1, 1996, and which is a tax-exempt 26 U.S.C. 501(c)(3) corporation, may act as an attorney in fact if the assets of the principal are not used in any way for the benefit of the corporation. It is unclear why this provision is limited to specified not-for-profit corporations who were appointed as a guardian prior to January 1, 1996.

### Section 3.

The bill amends section 733.707, Florida Statutes, by inserting the missing definition of the term "right of revocation." The term is defined as a power retained by the decedent, held in any capacity, to: amend or revoke the trust and revest the principal of the trust in the decedent; or withdraw or appoint the principal of the trust to or for the decedent's benefit.

### Section 4.

The bill amends section 737.111, Florida Statutes, to provide that it does not apply to trusts established as part of an employee annuity, an Individual Retirement Account, a Keogh Plan, or a retirement plan. The bill also establishes that the section does not apply to trust instruments executed prior to October 1, 1995.

**Section 5.**

The bill amends section 737.2041, Florida Statutes, to provide that a trustee and an attorney may agree to compensation different from that provided in the section. The agreement is not binding upon a person who bears the impact of the compensation unless that person is a party to the agreement "or otherwise consents to be bound by the agreement."

Compensation based upon the value of the trust assets and the income earned during initial administration is presumed to be reasonable *total* compensation for ordinary services for *all* attorneys employed to advise the trustee during initial trust administration. If a trustee retains an attorney for limited, specific legal services, compensation is to be as provided in the agreement. If the agreement does not specify compensation, it is to be determined by the factors set out in the subsection providing for court determination of reasonable attorney compensation. Finally, the bill deletes references to corporate fiduciaries, thus subjecting corporate fiduciary trustees to the same provisions as other trustees.

**Section 6.**

The bill amends section 737.303(4)(c), Florida Statutes, by deleting the term beneficiary, thereby requiring that the trustee give the annual report and other specified reports only to the grantor during the grantor's lifetime.

**Section 7.**

The bill amends section 737.308, Florida Statutes, concerning the trustee's duty to file a notice of trust upon the death of the settlor to require that the clerk send a copy of any caveat filed regarding the settlor to the trustee, and send the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same. This provides a link between the trustee and the caveator when there is no probate estate.

**Section 8.**

The bill substantially rewords and amends section 733.817, Florida Statutes.

Section 733.817(1)(a)-(g), Florida Statutes, amends the definitions of the following terms governing instrument, included in the measure of the tax, temporary interest, and value. This section creates definitions for the following terms: fiduciary, gross estate, internal revenue code, net tax, nonresiduary devise, nonresiduary interest, recipient, residuary devise, residuary interest, revocable trust, state, tax, and tentative Florida tax.

Section 733.817(2), Florida Statutes, provides that an interest in homestead property shall be exempt from the apportionment of taxes if the interest passes to a person to whom inures the decedent's exemption from forced sale under the State Constitution.

Section 733.817(3), Florida Statutes, provides that 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 tax measure. However,

- (a) The net tax attributable to interests included by reason of s. 2044 of the Internal Revenue Code (IRC) shall be determined as provided in the IRC and the amount so

determined shall be deducted from the tax to determine the net tax attributable to all remaining interests.

(b) The foreign tax credit 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.

(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 on a property to another state is greater than or equal to the tentative Florida tax attributable to the property, none of the Florida tax is attributable to the property.

2. If the net tax paid on a property to another state is less than the tentative Florida tax attributable to the property, the net Florida tax attributable to the property is the excess of the tentative Florida tax over the tax payable to the other state.

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

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

(d) The tax attributable to a temporary interest is regarded as attributable to the principal that supports the temporary interest.

(4) Except as otherwise effectively directed by the governing instrument, if the IRC 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. The provisions of this subsection do not affect allocation of the reduction in the Florida tax as provided in this section regarding estates of Florida residents which are also subject to tax in other states.

(5) Except as provided above or as otherwise directed in the governing documents, 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 devisees shall be charged to and paid from the residuary estate. If the residuary estate is insufficient to pay the net tax attributable to all nonresiduary devisees, the balance of the tax shall be apportioned among the recipients of the nonresiduary devisees.

2. The net tax attributable to residuary devisees shall be apportioned among the recipients of residuary devisees

(b) For property passing under the terms of a trust other than a trust created by 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. If the residuary portion is insufficient to pay the net tax attributable to all nonresiduary devisees, the balance of the tax shall be apportioned among the recipients of the nonresiduary interests.

2. The net tax attributable to residuary interests shall be apportioned among the recipients of the residuary interests

(c) The net tax attributable to an interest in homestead property shall be apportioned against the recipients of other interests in the estate or passing under any revocable trust

(d) This apportionment is to be made as if all recipients were taking under a common instrument

(e) The net tax imposed under s 4980A of the IRC 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.

(f) The net tax that is not apportioned under paragraphs (a), (b), and (c), 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 a court finds it inequitable to apportion the tax as directed by the statutes, it may assess liability for the payment of taxes in the manner it finds equitable.

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

(6) A personal representative or fiduciary is not to be required to transfer to a recipient any property which he or she reasonably anticipates may be necessary for payment of taxes nor to transfer any property until the amount of taxes due from the recipient is paid by the recipient.

(7) 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.

(8) 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, the personal representative or fiduciary is to recover the deficiency from the fiduciary in possession of the property to which the tax is apportioned or from the recipient.

(9) A personal representative or fiduciary who has the duty of collecting the apportioned tax may be relieved of this duty by order of the court upon specified findings.

(10) Any apportioned tax that is not collected shall be reapportioned as if the portion of the property to which the uncollected tax had been apportioned was 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 that person, to obtain contribution from those who have not paid the full amount of their portion of the tax.

(12) Nothing herein 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.

### **Section 9.**

The bill amends section 738.12, Florida Statutes, on underproductive trust property. Under the bill, 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, instead of the trustee paying the income beneficiary an amount equal to 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year, the trustee would pay 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.

The bill adds that, for purposes of the 3 percent calculation, 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

The bill deletes the existing language on retention of a portion of the income by the trustee

### **Section 10.**

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed.

## **III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT.**

### **A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:**

#### **1. Non-recurring Effects:**

None.

2. Recurring Effects:

None.

3 Long Run Effects Other Than Normal Growth:

Unknown.

4. Total Revenues and Expenditures:

N/A

**B FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:**

1 Non-recurring Effects.

Unknown

2 Recurring Effects.

The bill requires clerks of court to send a copy of any caveat filed to the trustee and to send the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same. Currently, this does not occur. It is unclear what impact this will have on the clerks of court.

3. Long Run Effects Other Than Normal Growth:

Unknown.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

1. Direct Private Sector Costs:

Unknown.

2. Direct Private Sector Benefits:

Certain not-for-profit corporations will be able to act as attorneys in fact. This is currently prohibited. The bill clarifies that the provisions requiring that trusts containing testamentary aspects be executed with the formalities of a will are prospective only. This should stop the current practice of some attorneys who are recommending that their clients have their existing trust instruments redrawn to comply with the law as changed in 1995

3. Effects on Competition, Private Enterprise and Employment Markets:

Unknown

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION.

A APPLICABILITY OF THE MANDATES PROVISION:

Article VII, Section 18 of the Florida Constitution provides in part:

(a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless:

If the fiscal impact is insignificant, then the proposed law is exempt from the mandates provision. HB 1411 requires clerks of court to send a copy of any caveat filed 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. Currently, the clerk must file and index the notice of trust and 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 must send a copy to the personal representative.

It is unclear at this time what the fiscal impact of this provision will be.

B REDUCTION OF REVENUE RAISING AUTHORITY.

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES.

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

The bill amends section 709.08, Florida Statutes, to provide that a not-for-profit charitable corporation, organized for charitable or religious purposes, which has qualified as a court-appointed guardian prior to January 1, 1996, and which is a tax-exempt 26 U.S.C. 501(c)(3) corporation, may act as an attorney in fact if the assets of the principal are not used in any way for the benefit of the corporation. It is unclear why this provision is limited to not-for-profit charitable corporations who were appointed as a guardian prior to January 1, 1996.

The bill provides that the amendments to the underproductive trust property section are to be applicable to all trusts, whenever executed. Article I, s. 10, Florida Constitution, prohibits the retroactive application of a statute when the application would impair the obligations of existing contracts. Therefore, this provision may be subject to constitutional challenge.

**STORAGE NAME.** h1411 rpp  
**DATE** April 12, 1997  
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**VI AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES**

**VII. SIGNATURES:**

**COMMITTEE ON REAL PROPERTY & PROBATE**

Prepared by

Legislative Research Director

\_\_\_\_\_  
P K. Jameson

\_\_\_\_\_  
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- McVoy, Ross A.** 200 W College Ave # 309 Tallahassee, FL 32301-7710 904/222-2515 Florida Cemetery Association 1601 Commerce Ave N St Petersburg, FL 33716 Montenay Power Corporation 3225 Aviation Ave 4th Floor Miami, FL 33133 Sarasota Manatee Airport Authority 6000 Airport Cir Sarasota, FL 34243
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- Meenan, Timothy J.** 204 S Monroe St Tallahassee, FL 32301 904/681-6710 Alamo Rent-A-Car, Inc PO Box 14245 Ft Lauderdale,



# COMMITTEE APPEARANCE RECORD



Bill No. HB 1411 Date 4/15/97

Name Linda McMiller

Address P.O. Box 2174

City Tallahassee State / Zip FL 32303

Phone Number (904) 222-2107

Representing Real Property, Probate & Trust Law  
Secretary, Fla Bar

Lobbyist (registered) Yes  No

State Employee Yes  No

I wish to speak:	<input type="checkbox"/>	19	<input type="checkbox"/>
		2886	<input checked="" type="checkbox"/>
*I have been requested to speak:	<input type="checkbox"/>	Proponent	<input checked="" type="checkbox"/>
		Opponent	<input type="checkbox"/>
		Information	<input checked="" type="checkbox"/>

Subject matter: estates and trusts

Committee: \_\_\_\_\_

\*If you are appearing at the request of the Chair, you must get signature of the Chair before leaving.

Appearing at request of Chair

Approved by \_\_\_\_\_ Chair

STORAGE NAME: h1411a rpp  
DATE: April 16, 1997

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
REAL PROPERTY & PROBATE  
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

**BILL #.** HB 1411

**RELATING TO:** The Administration of Trusts and Estates

**SPONSOR(S):** Representative Bloom

**STATUTE(S) AFFECTED:** Amending sections 689.255, 709.08, 733.707, 737.111, 737.2041, 737.303, 737.308, 733.817, and 738.12, Florida Statutes

**COMPANION BILL(S):** CS/SB's 818, 1136, & 1242

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) REAL PROPERTY & PROBATE YEAS 5 NAYS 0
  - (2)
  - (3)
  - (4)
  - (5)
- 

**I. SUMMARY:**

HB 1411 makes the following changes relating to the administration of trusts and estates:

- amends the rule against perpetuities;
- amends the durable power of attorney statute to permit certain not-for-profit corporations to act as an attorney in fact,
- provides a definition of revocable trusts;
- clarifies the effective date for the trust execution changes effective October 1, 1995, and also clarifies that the provisions of this section do not apply to specified retirement plans,
- amends provision relating to attorney's fees in representing a trustee,
- removes the words "or beneficiary" from section 737.303(4)(c), Florida Statutes;
- requires the clerk to send a copy of any caveat filed 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,
- substantial rewording and amendment to section 733.817, Florida Statutes, relating to apportionment of estate taxes, in order to align the state and federal tax codes
- section 738.12, Florida Statutes, relating to underproductive property, is amended to provide that a beneficiary is an income beneficiary only if the trust instrument is irrevocable and requires that the net income from the trust be paid to the beneficiary

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after

October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed.

This bill should not have a fiscal impact on state or local governments

## II SUBSTANTIVE RESEARCH.

### A. PRESENT SITUATION

#### **Rule Against Perpetuities**

Section 689.225, Florida Statutes, is the "Florida Uniform Statutory Rule Against Perpetuities." Subsection (2) provides a statement of the rule

A nonvested property interest in real or personal property is invalid unless: when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive, or the interest either vests or terminates within 90 years after its creation

A general power of appointment not presently exercisable because of a condition precedent is invalid unless: when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

A nongeneral power of appointment or a general testamentary power of appointment is invalid unless when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or the power is irrevocably exercised or otherwise terminates within 90 years after its creation

In determining whether a nonvested property interest or a power of appointment is valid, the possibility that a child will be born to an individual after the individual's death is disregarded.

#### **Probate**

Section 733.707, Florida Statutes, provides for the personal representative's payment of the expenses of the administration and obligations of the estate. Section 733.707(3), Florida Statutes, provides that 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 (c)*, 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. Paragraph (c) contains no definitions. During the 1995 Legislative session, this section of law was amended. There were two floor amendments to the bill relating to this section. One of those amendments would have change the reference to paragraph (c), to a reference to paragraph (e), and would have inserted the definition. However, due to an overlap in the amendments this change did not occur.

Section 733.707(3)(a), Florida Statutes, provides that, for purposes of subsection (3), 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, are not to be considered a trust over which the decedent has a right of revocation.

Section 737.111, Florida Statutes, was enacted in 1995 and took effect October 1, 1995. Ch. 95-401, s. 11, at 3287, Laws of Fla. The section provides that the testamentary aspects of a trust are invalid unless the trust is executed with the formalities required for the execution of a will. Also, the testamentary aspects of an amendment to a trust are invalid unless the amendment is executed with the same formalities as are required for a will. For the purposes of this section, the term "testamentary aspects" means those provisions of the trust that dispose of the trust property on the death of the settlor other than to the settlor's estate. This provision was intended to be prospective only. However, many residents of the state have contacted the House of Representatives after the enactment of this provision, complaining that their attorney's are advising them that their trusts are invalid unless they are re-executed with the formalities required for the execution of a will.

Section 737.303, Florida Statutes, sets out the duty of a trustee to inform and account to beneficiaries. The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. A beneficiary is entitled to a statement of the accounts of the trust annually and upon termination of the trust or upon change of the trustee except that, in the case of a trust described in s. 733.707(3), Florida Statutes, the trustee's duties extend only to the grantor or beneficiary or the legal representative of the grantor or beneficiary during the grantor's lifetime. Section 737.303(4)(e), Florida Statutes, provides that all rights which the section provides to a beneficiary may be asserted by a legal representative or natural guardian of the beneficiary. Notice of the trustee's acceptance of the trust and the statement of accounts provided to a representative of the beneficiary binds the beneficiary.

Section 737.308, Florida Statutes, requires that, upon the death of a settlor of a trust described in s. 737.707(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. The clerk must 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. The clerk is required to notify the trustee of any probate proceeding and to notify the personal representative of the notice of trust. However, if there is no probate proceeding, but a trust exists and there are caveators, there is no requirement that the clerk send a notice of trust to the caveators, nor must the clerk send the trustee copies of the caveats.

### **Durable Power of Attorney**

Prior to October 1, 1995, the durable power of attorney statute did not prescribe or limit who could serve as an attorney in fact. As amended in 1995, section 709.08(2), Florida Statutes, limits who can serve to either 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 Ch 95-401, s. 17, at 3292, Laws of Fla.

### **Trustee's Attorney's Fees**

Section 737 2041, Florida Statutes, provides that the attorney retained by the trustee of a trust described in s. 733 707(3), Florida Statutes, is entitled to reasonable compensation for legal services rendered in the initial administration of the trust payable from the assets of the trust without court order. 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.

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 section 733 6171(3)(a)-(h), Florida Statutes, is presumed to be reasonable compensation for attorneys in initial trust administration. This section provides that ordinary services of the attorney for a trustee include legal advice and representation relating to a list of possible duties of the trustee.

When a corporate fiduciary is serving as trustee or cotrustee, the presumptive fee for ordinary services and the list of what constitutes ordinary services does not apply, and what constitutes ordinary services and reasonable compensation for those services is instead 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 is allowed further reasonable compensation for any extraordinary service. What constitutes an extraordinary service may vary depending on many factors, including the size of the trust. The statute sets forth a list of some services which constitute extraordinary services.

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 is to consider all of a list of factors set forth in the section, giving such weight to each as it may determine to be appropriate.

### **Apportionment of Estate Tax**

Section 733.817, Florida Statutes, provides for apportionment of estate taxes. Any estate or other death tax shall be apportioned in the following manner.

If a part of the estate passed under a will by reference to a specific property or in any other nonresiduary form, exclusive of property over which the decedent had a power of appointment as defined from time to time under the estate tax laws of the United States, the net amount of the tax attributable to it shall be charged to and paid from the residuary estate without requiring contribution from persons receiving the interests, except as otherwise directed by the governing instrument. In the event the residuary estate is insufficient to pay the tax attributable to the interests, any balance of the tax

shall be equitably apportioned among the recipients of the interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interests so included, except as otherwise directed by the governing instrument.

If a part of the estate passed under the will as a residuary interest, exclusive of property over which the decedent had power of appointment, the net amount of tax attributable to it shall be equitably apportioned among the residuary beneficiaries in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests so included, except as otherwise directed by the governing instrument. When a residuary interest is a temporary interest, the tax attributable to it shall be charged to corpus and not apportioned between temporary and remainder interests.

If a part of the property concerning which the tax is levied or assessed is held under the terms of any trust created inter vivos, then, unless the governing instrument directs otherwise.

If any portion of the trust is directed to pass or to be held in further trust by reference to a specific property, or type of property, fund, sum, or statutory amount, or in any other nonresiduary form, the net amount of the tax attributable to that portion must be charged to and paid from the corpus of the residuary share of the trust without requiring contribution from the nonresiduary interest or the persons receiving or benefiting from that interest. If the residuary portion of the trust is insufficient to pay the tax attributable to all nonresiduary interests, any balance of the tax must be equitably apportioned among the recipients of those interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interest so included

The net amount of the tax directly attributable to the residuary share of the trust, if any, must be charged as follows: the net amount of the tax attributable to each residuary temporary interest must be charged to that portion of residuary principal that supports the temporary interest without apportionment, and the net amount of the tax attributable to the balance of the residuary share must be equitably apportioned among the residuary beneficiaries, by charge to the corpus of their interest in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests included.

Real property or mobile home homesteads that are exempt from execution by law shall be exempt from apportionment of taxes. Persons taking an interest in the homesteads shall not be liable for apportionment of taxes on account of the homesteads. The net amount of the tax attributable to homestead property shall be paid from other assets of any trust or the estate subject to administration in the order as directed by the governing instrument or, absent this direction, in the following order:

Property not disposed of by the will or trust.

Property passing as the residuary estate.

Property not specifically or demonstratively devised.

Property specifically or demonstratively devised.

The balance of the net amount of the tax shall be equitably apportioned among, and paid by, the recipients and beneficiaries of the properties or interests, in the proportion that the value of the property or interest of each included in the measure of the tax bears to the total value of all the properties and interests included in the measure of the tax, except as otherwise directed by the governing instrument. With respect to a temporary interest not in trust, the amount charged to the recipients or beneficiaries shall not be apportioned between temporary and remainder interests but shall be charged to and paid out of the corpus of the property or fund, except as otherwise directed by the governing instrument

Nothing contained in this section shall be construed to require the personal representative or other concerned fiduciary to pay any estate, inheritance, or other death taxes levied or assessed by any foreign country, unless specific directions to that effect are contained in the will or other instrument under which the fiduciary is acting

A direction against apportionment under this section may be explicit or implicit from the terms of the governing instrument, but must be clear and unequivocal; provided, however, that an implicit direction against apportionment is not sufficient to avoid the apportionment under state or applicable federal law unless the court also finds that the testator considered and made a deliberate and informed decision about the burden of taxation

No personal representative or other fiduciary shall be required to transfer any property until the amount of any tax due from the transferee is paid or, if the apportionment of tax has not been determined, until adequate security is furnished for the payment. The fiduciary shall not be required to distribute assets that he reasonably anticipates may be necessary to pay any state or federal taxes.

After the amount of all estate, inheritance, and death taxes is finally determined, the personal representative or other fiduciary shall petition for an order of apportionment and shall give formal notice of the petition and the hearing to all interested persons

### **Underproductive Property**

Section 738.12, Florida Statutes, provides for underproductive trust property. 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 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year. This amount shall be paid to the income beneficiary using the first principal cash available.

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. Upon the sale of the property the income beneficiary shall not be entitled to any portion of the proceeds of sale, except any amount previously owing and unpaid from the 3 percent of principal computation above sale shall be paid therefrom.

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 the 3 percent of principal computation above shall be retained or disposed of as provided by the terms of the trust.

**B EFFECT OF PROPOSED CHANGES:**

HB 1411 makes several changes relating to the administration of trusts and estates. The bill amends the rule against perpetuities, to provide that certain language in a governing instrument is inoperative to the extent that it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives, if in measuring a period from the creation of a trust or other property arrangement, the provision operates according to the specified subparagraphs.

The bill amends the durable power of attorney statute to permit certain not-for-profit corporations to act as attorneys in fact. A definition of revocable trusts which was inadvertently left out of the 1995 Legislation, is provided in the bill. The bill clarifies the effective date for the trust execution changes effective October 1, 1995, and also clarifies that the provisions of this section do not apply to specified retirement plans. The bill corrects a glitch, removing the words "or beneficiary" from section 737.303(4)(c), Florida Statutes.

The bill amends provision relating to attorney's fees in representing a trustee.

The bill requires the clerk to send a copy of any caveat filed 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. This fills a void with regard to a lack of notice when there is no probate estate, yet there are creditors, and a trust from which the creditors may be able to recover.

The bill substantially rewords and amends section 733.817, Florida Statutes, relating to apportionment of estate taxes, in order to align the state and federal tax codes. This section applies only if the will does not provide for the handling of taxes.

Section 738.12, Florida Statutes, relating to underproductive property, is amended to provide that a beneficiary is 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.

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed.

**C. APPLICATION OF PRINCIPLES:**

1. Less Government.

a. Does the bill create, increase or reduce, either directly or indirectly

(1) any authority to make rules or adjudicate disputes?

The bill changes the law relating to trusts and estate administration. This will have an affect on disputes in this area.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The bill requires clerks of court to send a copy of any caveat filed to the trustee and the notice of trust to any caveator, unless a probate proceeding is pending and the personal representative and the trustee are the same. Current law does not require this

(3) any entitlement to a government service or benefit?

See (2) above.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes.

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No

e. Does the bill authorize any fee or tax increase by any local government?

No

3. Personal Responsibility.

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill permits certain not-for-profit corporations to act as an attorney in fact. This will permit individuals to seek assistance from these corporations through a durable power of attorney. This is not currently available

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment

a. If the bill purports to provide services to families or children

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

The bill effects trusts and estates and the beneficiaries of trusts and estates, therefore, it does effect rights and obligations between family members as specified.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D SECTION-BY-SECTION RESEARCH:

**Section 1.**

Section 689.225(2), Florida Statutes, relating to the rule against perpetuities, is amended to provide that language in a governing instrument is inoperative to the extent that it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives, if, in measuring a period from the creation of a trust or other property arrangement, that language seeks to disallow the vesting or termination of any interest or trust beyond, seeks to postpone the vesting or termination of any interest or trust until, or seeks to operate in effect in any similar fashion upon, the later of

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

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

The new language is intended to coordinate with the Internal Revenue Service (IRS) position with respect to application of generation skipping transfer tax issues to trusts. The generation skipping tax provisions of the IRS were adopted in Florida in 1995.

**Section 2.**

The bill amends section 709.08, Florida Statutes, to provide that a not-for-profit corporation, organized for charitable or religious purposes, which has qualified as a court-appointed guardian prior to January 1, 1996, and which is a tax-exempt 26 U.S.C. 501(c)(3) corporation, may act as an attorney in fact if the assets of the principal are not used in any way for the benefit of the corporation. It is unclear why this provision is limited to specified not-for-profit corporations who were appointed as a guardian prior to January 1, 1996.

**Section 3.**

The bill amends section 733.707, Florida Statutes, by inserting the missing definition of the term "right of revocation." The term is defined as a power retained by the decedent, held in any capacity, to amend or revoke the trust and revest the principal of the trust in the decedent; or withdraw or appoint the principal of the trust to or for the decedent's benefit.

**Section 4.**

The bill amends section 737.111, Florida Statutes, to provide that it does not apply to trusts established as part of an employee annuity, an Individual Retirement Account, a Keogh Plan, or a retirement plan. The bill also establishes that the section does not apply to trust instruments executed prior to October 1, 1995.

**Section 5.**

The bill amends section 737.2041, Florida Statutes, to provide that a trustee and an attorney may agree to compensation different from that provided in the section. The agreement is not binding upon a person who bears the impact of the compensation unless that person is a party to the agreement "or otherwise consents to be bound by the agreement." Compensation based upon the value of the trust assets and the income earned during initial administration is presumed to be reasonable *total* compensation for ordinary services for *all* attorneys employed to advise the trustee during initial trust administration. If a trustee retains an attorney for limited, specific legal services, compensation is to be as provided in the agreement. If the agreement does not specify compensation, it is to be determined by the factors set out in the subsection providing for court determination of reasonable attorney compensation. Finally, the bill deletes references to corporate fiduciaries, thus subjecting corporate fiduciary trustees to the same provisions as other trustees.

**Section 6.**

The bill amends section 737.303(4)(c), Florida Statutes, by deleting the term beneficiary, thereby requiring that the trustee give the annual report and other specified reports only to the grantor during the grantor's lifetime.

**Section 7.**

The bill amends section 737.308, Florida Statutes, concerning the trustee's duty to file a notice of trust upon the death of the settlor to require that the clerk send a copy of any caveat filed regarding the settlor to the trustee, and send the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same. This provides a link between the trustee and the caveator when there is no probate estate.

**Section 8.**

The bill substantially rewords and amends section 733.817, Florida Statutes.

Section 733.817(1)(a)-(g), Florida Statutes, amends the definitions of the following terms: governing instrument, included in the measure of the tax, temporary interest, and value. This section creates definitions for the following terms: fiduciary, gross estate, internal revenue code, net tax, nonresiduary devise, nonresiduary interest, recipient, residuary devise, residuary interest, revocable trust, state, tax, and tentative Florida tax.

Section 733.817(2), Florida Statutes, provides that an interest in homestead property shall be exempt from the apportionment of taxes if the interest passes to a person to whom inures the decedent's exemption from forced sale under the State Constitution.

Section 733.817(3), Florida Statutes, provides that 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 tax measure. However:

(a) The net tax attributable to interests included by reason of s. 2044 of the Internal Revenue Code (IRC) shall be determined as provided in the IRC and the amount so determined shall be deducted from the tax to determine the net tax attributable to all remaining interests

(b) The foreign tax credit 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.

(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 on a property to another state is greater than or equal to the tentative Florida tax attributable to the property, none of the Florida tax is attributable to the property

2 If the net tax paid on a property to another state is less than the tentative Florida tax attributable to the property, the net Florida tax attributable to the property is the excess of the tentative Florida tax over the tax payable to the other state

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

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

(d) The tax attributable to a temporary interest is regarded as attributable to the principal that supports the temporary interest

(4) Except as otherwise effectively directed by the governing instrument, if the IRC 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. The provisions of this subsection do not affect allocation of the reduction in the Florida tax as provided in this section regarding estates of Florida residents which are also subject to tax in other states.

(5) Except as provided above or as otherwise directed in the governing documents, 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 devisees shall be charged to and paid from the residuary estate. If the residuary estate is insufficient to pay the net tax attributable to all nonresiduary devisees, the balance of the tax shall be apportioned among the recipients of the nonresiduary devisees

2. The net tax attributable to residuary devises shall be apportioned among the recipients of residuary devises.

(b) For property passing under the terms of a trust other than a trust created by 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. If the residuary portion is insufficient to pay the net tax attributable to all nonresiduary devises, the balance of the tax shall be apportioned among the recipients of the nonresiduary interests.

2. The net tax attributable to residuary interests shall be apportioned among the recipients of the residuary interests.

(c) The net tax attributable to an interest in homestead property shall be apportioned against the recipients of other interests in the estate or passing under any revocable trust.

(d) This apportionment is to be made as if all recipients were taking under a common instrument.

(e) The net tax imposed under s. 4980A of the IRC 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.

(f) The net tax that is not apportioned under paragraphs (a), (b), and (c), 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 a court finds it inequitable to apportion the tax as directed by the statutes, it may assess liability for the payment of taxes in the manner it finds equitable.

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

(6) A personal representative or fiduciary is not to be required to transfer to a recipient any property which he or she reasonably anticipates may be necessary for payment of taxes nor to transfer any property until the amount of taxes due from the recipient is paid by the recipient.

(7) 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.

(8) 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, the personal representative or fiduciary is to recover the deficiency from the

fiduciary in possession of the property to which the tax is proportioned or from the recipient.

(9) A personal representative or fiduciary who has the duty of collecting the apportioned tax may be relieved of this duty by order of the court upon specified findings.

(10) Any apportioned tax that is not collected shall be reapportioned as if the portion of the property to which the uncollected tax had been apportioned was 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 that person, to obtain contribution from those who have not paid the full amount of their portion of the tax.

(12) Nothing herein 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

### **Section 9.**

The bill amends section 738 12, Florida Statutes, on underproductive trust property. Under the bill, 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, instead of the trustee paying the income beneficiary an amount equal to 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year, the trustee would pay 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

The bill adds that, for purposes of the 3 percent calculation, 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

The bill deletes the existing language on retention of a portion of the income by the trustee.

### **Section 10.**

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed

## III. **FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT**

A FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth.

Unknown.

4. Total Revenues and Expenditures:

N/A

B FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE

1. Non-recurring Effects:

Unknown.

2. Recurring Effects:

The bill requires clerks of court to send a copy of any caveat filed to the trustee and to send the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same. Currently, this does not occur. It is unclear what impact this will have on the clerks of court.

3. Long Run Effects Other Than Normal Growth:

Unknown.

C DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

1. Direct Private Sector Costs

Unknown

2. Direct Private Sector Benefits

Certain not-for-profit corporations will be able to act as attorneys in fact. This is currently prohibited. The bill clarifies that the provisions requiring that trusts containing testamentary aspects be executed with the formalities of a will are prospective only. This should stop the current practice of some attorneys who are recommending that their clients have their existing trust instruments redrawn to comply with the law as changed in 1995.

3. Effects on Competition, Private Enterprise and Employment Markets:

Unknown

D. FISCAL COMMENTS:

IV CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Article VII, Section 18 of the Florida Constitution provides in part:

(a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless.

If the fiscal impact is insignificant, then the proposed law is exempt from the mandates provision. HB 1411 requires clerks of court to send a copy of any caveat filed 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. Currently, the clerk must file and index the notice of trust and 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 must send a copy to the personal representative.

If, in the aggregate, the bill would have an insignificant fiscal impact, the bill is exempt from the mandates provision. The term "insignificant" means an amount not greater than the average statewide population for the applicable fiscal year times ten cents. For fiscal year 1997-98, a bill that would have a statewide annual fiscal impact on counties and municipalities, in aggregate, of \$1 44 million or less is exempt. According to the Florida Association of Court Clerks and Comptrollers, the impact of this bill will be minimal. Therefore, it is the position of the Chair of the Committee on Real Property & Probate, that this bill is exempt from the mandates provision in that the fiscal impact on local governments is insignificant.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES.

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

The bill amends section 709.08, Florida Statutes, to provide that a not-for-profit charitable corporation, organized for charitable or religious purposes, which has qualified as a court-appointed guardian prior to January 1, 1996, and which is a tax-exempt 26 U.S.C. 501(c)(3) corporation, may act as an attorney in fact if the assets of the principal are not used in any way for the benefit of the corporation. It is unclear why this provision is limited to not-for-profit charitable corporations who were appointed as a guardian prior to January 1, 1996.

The bill provides that the amendments to the underproductive trust property section are to be applicable to all trusts, whenever executed. Article I, s. 10, Florida Constitution, prohibits the retroactive application of a statute when the application would impair the obligations of existing contracts. Therefore, this provision may be subject to constitutional challenge.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

A strike everything amendment was adopted by the Committee on Real Property & Probate. The differences between the strike everything and the bill are as follows:

**Section 1.** The statement of the rule against perpetuities is redrafted to conform to the Uniform Probate Code.

**Section 2.** No change

**Section 3** Increases the amount the personal representative or other person can expend for reasonable funeral, interment, and grave marker expenses from \$3,000 to \$6,000.

**Section 4.** No change

**Section 5.** No change

**Section 6** Adds a provision that "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 section 731.303, Florida Statutes, if such notice or statement of accounts, respectively, is provided to that representative "

**Section 7.** No substantive change

**Section 8** This section of the Amendment, is a new provision which does not appear in HB 1411. This provision permits fiduciaries to delegate investment functions

**Section 9.** This section of the Amendment corresponds with Section 8 of HB 1411. There is no change in this section.

**Section 10.** This section of the Amendment corresponds with Section 9 of HB 1411. There is no change in this section.

**Section 11.** This section of the Amendment is not in HB 1411. The Amendment changes a provision in section 744.441, Florida Statutes, relating to the power of guardians to increase the reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate, up to a maximum of \$3,000. The amendment increases the amount to \$6,000.

**Section 12.** This section of the Amendment changes section 655.936, Florida Statutes, relating to safe-deposit box contents. The Amendment requires the initial opening of any safe-deposit box of the decedent to be conducted in the presence of an employee of the institution where the box is located and the personal representative. Likewise, the inventory must be conducted in the presence of the employee and the personal representative, each of whom must verify the contents. The safe-deposit box inventory must be filed with the court within 10 days after the box is opened. This provision is not in HB 1411.

**Section 13.** This section of the Amendment changes section 733.604, Florida Statutes, relating to inventory to comport to the change in Section 12 of the Amendment. This provision is not in HB 1411.

**Section 14.** This section of the Amendment is the same as Section 10 of HB 1411.

VII SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE.

Prepared by.

Legislative Research Director:

\_\_\_\_\_  
P K Jameson

\_\_\_\_\_  
P K. Jameson

Journal  
of the  
Florida  
House of Representatives



Ninety-ninth  
Regular Session

since Statehood in 1845

March 4 through May 2, 1997

[Including a record of transmittal of Acts subsequent to *sine die* adjournment]

Rep Betancourt moved the adoption of the committee amendments, which were adopted *en bloc*

On motion by Rep Betancourt, the rules were suspended and HB 1369, as amended, was read the third time by title. On passage, the vote was

Yeas—107

The Chair	Crow	Kosmas	Ritter
Albright	Culp	Lacasa	Roberts-Burke
Andrews	Dawson-White	Laurent	Rodriguez-Chomat
Argenziano	Dennis	Lawson	Rojas
Arnall	Dockery	Littlefield	Safley
Arnold	Edwards	Logan	Saunders
Bainter	Effman	Lynn	Sembler
Ball	Eggelletion	Mackenzie	Silver
Barreiro	Fasano	Mackey	Sundler
Betancourt	Feeney	Maygarden	Smith
Bitner	Fischer	Meek	Spratt
Bloom	Flanagan	Melvin	Stabins
Boyd	Fuller	Merchant	Stafford
Bradley	Futch	Miller	Starks
Brennan	Gay	Minton	Thrasher
Bronson	Geller	Morrison	Tobin
Brown	Goode	Morse	Trovillion
Bullard	Hafner	Murman	Turnbull
Burroughs	Harrington	Ogles	Valdes
Bush	Healey	Peaden	Villalobos
Byrd	Heyman	Posey	Wallace
Casey	Hill	Prewitt, D	Wasserman Schultz
Clemons	Horan	Pruitt, K	Westbrook
Constantine	Jacobs	Putnam	Wiles
Cosgrove	Jones	Rayson	Wise
Crady	Kelly	Reddick	Ziebarth
Crist	King	Rutchie	

Nays—None

Excused from time to time for Conference Committee—Albright, Bainter, Bradley, Bronson, Chestnut, Constantine, Crady, Culp, Dennis, Edwards, Feeney, Flanagan, Garcia, Gay, Hafner, Horan, Jones, Lawson, Littlefield, Logan, Lynn, Mackenzie, Mackey, Meek, Merchant, Minton, Morse, Posey, K. Pruitt, Reddick, Sanderson, Sembler, Smith, Stabins, Starks, Sublette, Thrasher, Valdes, Villalobos, Wasserman Schultz, Wise

Votes after roll call

Yeas—Carlton, Lippman

So the bill passed, as amended, and was immediately certified to the Senate after engrossment.

CS/HB 1387—A bill to be entitled An act relating to dietetics and nutrition practice, creating a Task Force on Exemptions from Licensure under s 468 505(1)(k), F S, which exempts certain persons employed by a hospital, nursing home, assisted living facility, or continuing care facility, providing for membership and meetings of the task force, including place of meetings, requiring a report to certain legislative leaders, providing responsibilities of the task force, providing for dissolution of the task force, providing an effective date

—was read the second time by title. On motion by Rep Jones, the rules were suspended and the bill was read the third time by title. On passage, the vote was

Yeas—112

The Chair	Bainter	Boyd	Bullard
Albright	Ball	Bradley	Burroughs
Andrews	Barreiro	Brennan	Bush
Argenziano	Betancourt	Bronson	Byrd
Arnall	Bitner	Brooks	Carlton
Arnold	Bloom	Brown	Casey

Clemons	Goode	Maygarden	Safley
Constantine	Hafner	Meek	Sanderson
Cosgrove	Harrington	Melvin	Saunders
Crady	Healey	Merchant	Sembler
Crist	Heyman	Miller	Silver
Crow	Hill	Minton	Sindler
Culp	Horan	Morrison	Smith
Dawson-White	Jacobs	Morse	Spratt
Dennis	Jones	Murman	Stabins
Diaz de la Portilla	Kelly	Ogles	Stafford
Dockery	King	Peaden	Thrasher
Edwards	Kosmas	Posey	Tobin
Effman	Lacasa	Prewitt, D	Trovillion
Eggelletion	Laurent	Pruitt, K	Turnbull
Fasano	Lawson	Putnam	Valdes
Feeney	Lippman	Rayson	Villalobos
Fischer	Littlefield	Reddick	Wallace
Frankel	Logan	Ritche	Wasserman Schultz
Fuller	Lynn	Ritter	Westbrook
Futch	Mackenzie	Roberts-Burke	Wiles
Gay	Mackey	Rodriguez-Chomat	Wise
Geller	Martinez	Rojas	Ziebarth

Nays—None

Excused from time to time for Conference Committee—Albright, Bainter, Bradley, Bronson, Chestnut, Constantine, Crady, Culp, Dennis, Edwards, Feeney, Flanagan, Garcia, Gay, Hafner, Horan, Jones, Lawson, Littlefield, Logan, Lynn, Mackenzie, Mackey, Meek, Merchant, Minton, Morse, Posey, K. Pruitt, Reddick, Sanderson, Sembler, Smith, Stabins, Starks, Sublette, Thrasher, Valdes, Villalobos, Wasserman Schultz, Wise

So the bill passed and was immediately certified to the Senate

**HB 1411**—A bill to be entitled 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, 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 language 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 language 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, revising a provision of law governing notice of trust to provide that the clerk shall send a copy of any caveat filed regarding the settlor to the trustee, and the notice of trust to the caveator, providing an exception; 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, providing an effective date

—was read the second time by title

The Committee on Real Property & Probate offered the following

**Amendment 1 (with title amendment)**—On page 2, line(s) 11, remove from the bill everything after the enacting clause

and insert in lieu thereof

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 ~~\$2,000~~

(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.

~~(3) 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)(4)~~ 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)(4)~~ Obtaining nontaxable certificate and receipt, if not done by a personal representative.

~~(k)(4)~~ 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)(4)~~ Distribution of income or principal to beneficiaries or funding of further trusts provided in the governing instrument.

~~(m)(4)~~ Preparation of any legal documents required to effect distribution

~~(n)(4)~~ Fiduciary duties, avoidance of self-dealing, conflicts of interest, duty of impartiality, and obligations to beneficiaries

~~(o)(4)~~ 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)(4)~~ 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 these 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)(e) 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, calculated 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

~~(2) 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 safekeeping 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

And the title is amended as follows

On page 1, line(s) 2, through

Page 2, line(s) 7 remove from the title of the bill all of said lines

and insert in lieu thereof

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

Rep Bloom moved the adoption of the amendment, which was adopted

On motion by Rep Bloom, the rules were suspended and HB 1411, as amended, was read the third time by title On passage, the vote was

Yeas—112

The Chair	Crist	King	Reddick
Albright	Crow	Kosmas	Ritchie
Andrews	Culp	Lacasa	Ritter
Argenziano	Dawson-White	Laurent	Roberts-Burke
Arnall	Dennis	Lawson	Rodriguez-Chomat
Arnold	Diaz de la Portilla	Lippman	Rojas
Bainter	Dockery	Littlefield	Safley
Ball	Edwards	Logan	Saunders
Barreiro	Effman	Lynn	Sembler
Betancourt	Eggelieton	Mackenzie	Silver
Butner	Fasano	Mackey	Sindler
Bloom	Feeney	Martinez	Smith
Boyd	Fischer	Maygarden	Spratt
Bradley	Flanagan	Meek	Stabins
Brennan	Frankel	Melvin	Stafford
Bronson	Fuller	Merchant	Starks
Brooks	Futch	Miller	Thrasher
Brown	Gay	Minton	Tobin
Bullard	Geller	Morrone	Trovillion
Burrourghs	Goode	Morse	Turnbull
Bush	Hafner	Murman	Valdes
Byrd	Harrington	Ogles	Villalobos
Carlton	Healey	Peaden	Wallace
Casey	Heyman	Posey	Wasserman Schultz
Clemons	Hill	Prewitt, D	Westbrook
Constantine	Horan	Pruitt, K.	Wiles
Cosgrove	Jones	Putnam	Wise
Crady	Kelly	Rayson	Ziebarth

Nays—None

Excused from time to time for Conference Committee—Albright, Bainter, Bradley, Bronson, Chestnut, Constantine, Crady, Culp, Dennis, Edwards, Feeney, Flanagan, Garcia, Gay, Hafner, Horan, Jones, Lawson, Littlefield, Logan, Lynn, Mackenzie, Mackey, Meek, Merchant, Minton, Morse, Posey, K. Pruitt, Reddick, Sanderson, Sembler, Smith, Stabins, Starks, Sublette, Thrasher, Valdes, Villalobos, Wasserman Schultz, Wise

So the bill passed, as amended, and was immediately certified to the Senate after engrossment

On motion by Rep Arnall, CS/HB 1445 was temporarily postponed under Rule 147 and the second reading nullified

HB 1447—A bill to be entitled An act relating to veterinary medical practice, amending s 474 203, F S, revising and providing exemptions from regulation under chapter 474, F S, relating to veterinary medical practice, amending s 474 207, F S, relating to licensure by examination, authorizing the Board of Veterinary Medicine to require a personal appearance of any applicant, requiring certain notice to the applicant, eliminating obsolete provisions, amending s 474 211, F S, requiring criteria for providers of continuing education to be approved by the board, amending s 474 214, F S, increasing the administrative fine, providing circumstances for expunction of citations from the veterinarian's record, amending s 474 215, F S, requiring limited service permittees to register each location and providing a registration fee, providing requirements for certain temporary rabies vaccination efforts, providing permit and other requirements for persons who are not licensed veterinarians but who desire to own and operate a veterinary medical establishment, providing disciplinary actions applicable to holders of premises permits, creating s 474 2175, F S, providing for investigation of unlicensed activity, providing for hearings, providing penalties, reenacting s 474 217(2), F S, relating to licensure by endorsement, to incorporate the amendment to s 474 214, F S, in a reference thereto, providing an effective date

—was read the second time by title

The Committee on Business Regulation & Consumer Affairs offered the following

**Amendment 1 (with title amendment)—**

Remove from the bill Everything after the enacting clause

and insert in lieu thereof

Section 1 Section 474 203, Florida Statutes, is amended to read

474 203 Exemptions —This chapter shall not apply to

(1) Any faculty member practicing only in conjunction with teaching ~~duties at a school~~ or college of veterinary medicine. ~~Such school or college shall be~~ located in this state and be accredited by the American Veterinary Medical Association Council on Education *This exemption shall only apply to such faculty member does not hold a valid license issued under this chapter but who is a graduate of a school or college of veterinary medicine accredited by the American Veterinary Medical Association Council on Education or a school or college recognized by the American Veterinary Medical Association Commission for Foreign Veterinary Graduates* The faculty member exemption shall automatically expire when such school or college terminates the faculty member from such teaching duties On December 31 of each year, such school or college shall provide the board with a written list of all faculty who are exempt from this chapter Such school or college shall also notify the board in writing of any additions or deletions to such list.

(2) *A person practicing as an intern or resident veterinarian and who does not hold a valid license issued under this chapter and who is a graduate in training at a school or college of veterinary medicine located in this state and accredited by the American Veterinary Medical Association Council on Education or a school or college recognized by the American Veterinary Medical Association Commission for Foreign Veterinary Graduates Such intern or resident must be a graduate of a school or college of veterinary medicine accredited by the American Veterinary Medical Association Council on Education This exemption shall expire when such intern or resident completes or is terminated from such training Each school or college at which such intern or resident is in training shall on July 1 of each year, provide the board with a written list of all such interns or residents designated for this exemption, and the school or college shall also notify the board of any additions or deletions to the list*

(3)(4) A student in a school or college of veterinary medicine while in the performance of duties assigned by his instructor or when working as a preceptor under the immediate supervision of a licensee, provided that such preceptorship is required for graduation from an accredited

STORAGE NAME h1411z rpp  
DATE June 9, 1997

**\*\*AS PASSED BY THE LEGISLATURE\*\***  
CHAPTER # 97-240, Laws of Florida

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
REAL PROPERTY & PROBATE  
FINAL BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

**BILL #** HB 1411

**RELATING TO** The Administration of Trusts and Estates

**SPONSOR(S)** Representative Bloom

**STATUTE(S) AFFECTED** Amending sections 689.255, 709 08, 733.707, 737 111, 737.2041, 737 303, 737 308, 733 817, and 738 12, Florida Statutes

**COMPANION BILL(S).** CS/SB's 818, 1136, & 1242

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE.**

- (1) REAL PROPERTY & PROBATE YEAS 5 NAYS 0
- (2)
- (3)
- (4)
- (5)

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**I. SUMMARY**

HB 1411 makes the following changes relating to the administration of trusts and estates:

- amends the rule against perpetuities, amends the durable power of attorney statute to permit certain not-for-profit corporations to act as an attorney in fact, increases the amount the personal representative, guardian, or other person can expend for reasonable funeral, interment, and grave marker expenses from \$3,000 to \$6,000; provides a definition of revocable trusts; clarifies the effective date for the trust execution changes effective October 1, 1995, and also clarifies that the provisions of this section do not apply to specified retirement plans, amends provision relating to attorney's fees in representing a trustee, removes the words "or beneficiary" from section 737.303(4)(c), Florida Statutes,
- permits fiduciaries to delegate investment functions, requires the clerk to send a copy of any caveat filed 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, substantial rewording and amendment to section 733.817, Florida Statutes, relating to apportionment of estate taxes, in order to align the state and federal tax codes; section 738 12, Florida Statutes, relating to underproductive property, is amended to provide that a beneficiary is an income beneficiary only if the trust instrument is irrevocable and requires that the net income from the trust be paid to the beneficiary; requires the initial opening of any safe-deposit box of the decedent to be conducted in the presence of an employee of the institution where the box is located and the personal representative As well, the inventory must be conducted in the presence of the employee and the personal representative, each of whom must verify the contents

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed. This bill should not have a significant fiscal impact on state or local governments

## II SUBSTANTIVE RESEARCH

### A PRESENT SITUATION

#### **Rule Against Perpetuities**

Section 689.225, Florida Statutes, is the "Florida Uniform Statutory Rule Against Perpetuities." Subsection (2) provides a statement of the rule.

A nonvested property interest in real or personal property is invalid unless: when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive, or the interest either vests or terminates within 90 years after its creation.

A general power of appointment not presently exercisable because of a condition precedent is invalid unless, when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive, or the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

A nongeneral power of appointment or a general testamentary power of appointment is invalid unless: when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

In determining whether a nonvested property interest or a power of appointment is valid, the possibility that a child will be born to an individual after the individual's death is disregarded.

#### **Probate**

Section 733.707, Florida Statutes, provides for the personal representative's payment of the expenses of the administration and obligations of the estate. Section 733.707(3), Florida Statutes, provides that 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 (c), 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. Paragraph (c) contains no definitions. During the 1995 Legislative session, this section of law was amended. There were two floor amendments to the bill relating to this section. One of those amendments would have changed the reference to paragraph (c), to a reference to paragraph (e), and would have inserted the definition. However, due to an overlap in the amendments this change did not occur.

Section 733.707(3)(a), Florida Statutes, provides that, for purposes of subsection (3), 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

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**DATE.** June 9, 1997

**PAGE 3**

amended, are not to be considered a trust over which the decedent has a right of revocation.

Section 737.111, Florida Statutes, was enacted in 1995 and took effect October 1, 1995. Ch 95-401, s 11, at 3287, Laws of Florida The section provides that the testamentary aspects of a trust are invalid unless the trust is executed with the formalities required for the execution of a will. Also, the testamentary aspects of an amendment to a trust are invalid unless the amendment is executed with the same formalities as are required for a will. For the purposes of this section, the term "testamentary aspects" means those provisions of the trust that dispose of the trust property on the death of the settlor other than to the settlor's estate. This provision was intended to be prospective only. However, many residents of the state contacted the House of Representatives after the enactment of this provision, complaining that their attorney's are advising them that their trusts are invalid unless they are re-executed with the formalities required for the execution of a will.

Section 737.303, Florida Statutes, sets out the duty of a trustee to inform and account to beneficiaries. The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. A beneficiary is entitled to a statement of the accounts of the trust annually and upon termination of the trust or upon change of the trustee except that, in the case of a trust described in s 733.707(3), Florida Statutes, the trustee's duties extend only to the grantor or beneficiary or the legal representative of the grantor or beneficiary during the grantor's lifetime. Section 737.303(4)(e), Florida Statutes, provides that all rights which the section provides to a beneficiary may be asserted by a legal representative or natural guardian of the beneficiary. Notice of the trustee's acceptance of the trust and the statement of accounts provided to a representative of the beneficiary binds the beneficiary.

Section 737.308, Florida Statutes, requires that, upon the death of a settlor of a trust described in s. 737.707(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. The clerk must 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. The clerk is required to notify the trustee of any probate proceeding and to notify the personal representative of the notice of trust. However, if there is no probate proceeding, but a trust exists and there are caveators, there is no requirement that the clerk send a notice of trust to the caveators, nor must the clerk send the trustee copies of the caveats.

### **Reasonable Funeral Expenses**

Section 733.707(1)(b), F.S., provides that a personal representative is to pay reasonable funeral, interment, and grave marker expenses not to exceed \$3,000.

Similarly, s. 744.441(6), F.S., provides that a guardian may pay reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate up to a maximum of \$3,000.

### **Delegation of Investment Functions**

Section 518 112, Florida Statutes, provides for fiduciary delegation of investment functions. A fiduciary may delegate 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 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.
- \* In the case of a guardianship, the fiduciary has obtained court approval
- \* 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 the beneficiaries eligible to receive income from the trust or distributions from the 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 to delegate investment functions pursuant to this subsection.
- \* Notice to beneficiaries eligible to receive income from the trust or distributions from the estate, at the time of delegation, shall be sufficient notice to all persons who may join the eligible class of beneficiaries in the future.
- \* In the case of a minor, notice may be sent to a parent or legal guardian of the minor
- \* 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

If all the foregoing requirements are satisfied, the fiduciary shall not be responsible otherwise for the investment decisions or actions of the investment agent to which the investment functions are delegated. In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary. The investment agent shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state.

The section applies to all existing and future fiduciary relationships subject to the section, but only as to acts or omissions occurring after October 1, 1993.

### **Durable Power of Attorney**

Prior to October 1, 1995, the durable power of attorney statute did not prescribe or limit who could serve as an attorney in fact. As amended in 1995, section 709.08(2), Florida Statutes, limits who can serve to either 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. Ch 95-401, s 17, at 3292, Laws of Fla

### **Trustee's Attorney's Fees**

Section 737 2041, Florida Statutes, provides that the attorney retained by the trustee of a trust described in s 733.707(3), Florida Statutes, is entitled to reasonable compensation for legal services rendered in the initial administration of the trust payable

from the assets of the trust without court order. 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

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 section 733.6171(3)(a)-(h), Florida Statutes, is presumed to be reasonable compensation for attorneys in initial trust administration. This section provides that ordinary services of the attorney for a trustee include legal advice and representation relating to a list of possible duties of the trustee

When a corporate fiduciary is serving as trustee or cotrustee, the presumptive fee for ordinary services and the list of what constitutes ordinary services does not apply, and what constitutes ordinary services and reasonable compensation for those services is instead 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 is allowed further reasonable compensation for any extraordinary service. What constitutes an extraordinary service may vary depending on many factors, including the size of the trust. The statute sets forth a list of some services which constitute extraordinary services

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 is to consider all of a list of factors set forth in the section, giving such weight to each as it may determine to be appropriate

### **Apportionment of Estate Tax**

Section 733.817, Florida Statutes, provides for apportionment of estate taxes. Any estate or other death tax shall be apportioned in the following manner:

If a part of the estate passed under a will by reference to a specific property or in any other nonresiduary form, exclusive of property over which the decedent had a power of appointment as defined from time to time under the estate tax laws of the United States, the net amount of the tax attributable to it shall be charged to and paid from the residuary estate without requiring contribution from persons receiving the interests, except as otherwise directed by the governing instrument. In the event the residuary estate is insufficient to pay the tax attributable to the interests, any balance of the tax shall be equitably apportioned among the recipients of the interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interests so included, except as otherwise directed by the governing instrument.

If a part of the estate passed under the will as a residuary interest, exclusive of property over which the decedent had power of appointment, the net amount of tax attributable to it shall be equitably apportioned among the residuary beneficiaries in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests so included, except as otherwise directed by the

governing instrument When a residuary interest is a temporary interest, the tax attributable to it shall be charged to corpus and not apportioned between temporary and remainder interests

If a part of the property concerning which the tax is levied or assessed is held under the terms of any trust created inter vivos, then, unless the governing instrument directs otherwise.

If any portion of the trust is directed to pass or to be held in further trust by reference to a specific property, or type of property, fund, sum, or statutory amount, or in any other nonresiduary form, the net amount of the tax attributable to that portion must be charged to and paid from the corpus of the residuary share of the trust without requiring contribution from the nonresiduary interest or the persons receiving or benefiting from that interest. If the residuary portion of the trust is insufficient to pay the tax attributable to all nonresiduary interests, any balance of the tax must be equitably apportioned among the recipients of those interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interest so included.

The net amount of the tax directly attributable to the residuary share of the trust, if any, must be charged as follows: the net amount of the tax attributable to each residuary temporary interest must be charged to that portion of residuary principal that supports the temporary interest without apportionment, and the net amount of the tax attributable to the balance of the residuary share must be equitably apportioned among the residuary beneficiaries, by charge to the corpus of their interest in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests included.

Real property or mobile home homesteads that are exempt from execution by law shall be exempt from apportionment of taxes. Persons taking an interest in the homesteads shall not be liable for apportionment of taxes on account of the homesteads. The net amount of the tax attributable to homestead property shall be paid from other assets of any trust or the estate subject to administration in the order as directed by the governing instrument or, absent this direction, in the following order.

Property not disposed of by the will or trust

Property passing as the residuary estate.

Property not specifically or demonstratively devised

Property specifically or demonstratively devised.

The balance of the net amount of the tax shall be equitably apportioned among, and paid by, the recipients and beneficiaries of the properties or interests, in the proportion that the value of the property or interest of each included in the measure of the tax bears to the total value of all the properties and interests included in the measure of the tax, except as otherwise directed by the governing instrument. With respect to a temporary interest not in trust, the amount charged to the recipients or beneficiaries shall not be apportioned between temporary and remainder interests but shall be charged to and paid out of the corpus of the property or fund, except as otherwise directed by the governing instrument.

Nothing contained in this section shall be construed to require the personal representative or other concerned fiduciary to pay any estate, inheritance, or other death taxes levied or assessed by any foreign country, unless specific directions to that effect are contained in the will or other instrument under which the fiduciary is acting

A direction against apportionment under this section may be explicit or implicit from the terms of the governing instrument, but must be clear and unequivocal, provided, however, that an implicit direction against apportionment is not sufficient to avoid the apportionment under state or applicable federal law unless the court also finds that the testator considered and made a deliberate and informed decision about the burden of taxation.

No personal representative or other fiduciary shall be required to transfer any property until the amount of any tax due from the transferee is paid or, if the apportionment of tax has not been determined, until adequate security is furnished for the payment. The fiduciary shall not be required to distribute assets that he reasonably anticipates may be necessary to pay any state or federal taxes

After the amount of all estate, inheritance, and death taxes is finally determined, the personal representative or other fiduciary shall petition for an order of apportionment and shall give formal notice of the petition and the hearing to all interested persons.

### **Underproductive Property**

Section 738.12, Florida Statutes, provides for underproductive trust property. 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 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year. This amount shall be paid to the income beneficiary using the first principal cash available.

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. Upon the sale of the property the income beneficiary shall not be entitled to any portion of the proceeds of sale, except any amount previously owing and unpaid from the 3 percent of principal computation above sale shall be paid therefrom.

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 the 3 percent of principal computation above shall be retained or disposed of as provided by the terms of the trust.

### **B. EFFECT OF PROPOSED CHANGES:**

HB 1411 makes several changes relating to the administration of trusts and estates. The bill amends the rule against perpetuities, to provide that certain language in a governing instrument is inoperative to the extent that it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives, if in measuring a period from the creation of a trust or other property arrangement, the provision operates according to the specified subparagraphs

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The bill amends the durable power of attorney statute to permit certain not-for-profit corporations to act as attorneys in fact. The limit on reasonable funeral expenses which can be paid by a personal representative, guardian, or other person is increased from \$3,000 to \$6,000. A definition of revocable trusts which was inadvertently left out of the 1995 Legislation, is provided in the bill. The bill clarifies the effective date for the trust execution changes effective October 1, 1995, and also clarifies that the provisions of this section do not apply to specified retirement plans. The bill corrects a glitch, removing the words "or beneficiary" from section 737.303(4)(c), Florida Statutes, and provides that the trustee is not required to provide a notice or statement of accounts to any beneficiary who would be bound by an order binding on a representative of the beneficiary as specified.

The bill amends provision relating to attorney's fees in representing a trustee.

The bill requires the clerk to send a copy of any caveat filed 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. This fills a void with regard to a lack of notice when there is no probate estate, yet there are creditors, and a trust from which the creditors may be able to recover.

The bill permits a fiduciary to delegate any part or all of the investments functions to an investment agency as specified.

The bill substantially rewords and amends section 733.817, Florida Statutes, relating to apportionment of estate taxes, in order to align the state and federal tax codes. This section applies only if the will does not provide for the handling of taxes.

Section 738.12, Florida Statutes, relating to underproductive property, is amended to provide that a beneficiary is 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.

Section 744.441, Florida Statutes, relating to the power of guardians is amended to increase the reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate, from a maximum of \$3,000 to a maximum of \$6,000.

Section 655.936, Florida Statutes, relating to safe-deposit box contents is amended to require the initial opening of any safe-deposit box of the decedent to be conducted in the presence of an employee of the institution where the box is located and the personal representative. Likewise, the inventory must be conducted in the presence of the employee and the personal representative, each of whom must verify the contents. The safe-deposit box inventory must be filed with the court within 10 days after the box is opened. Section 733.604, Florida Statutes, relating to inventory, is amended to comport with the change in s. 655.936, F.S.

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed.

C APPLICATION OF PRINCIPLES

1. Less Government

a Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill changes the law relating to trusts and estate administration. This will have an affect on disputes in this area

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The bill requires clerks of court to send a copy of any caveat filed to the trustee and the notice of trust to any caveator, unless a probate proceeding is pending and the personal representative and the trustee are the same. Current law does not require this

(3) any entitlement to a government service or benefit?

See (2) above.

b. If an agency or program is eliminated or reduced

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes

a. Does the bill increase anyone's taxes?

No.

- b Does the bill require or authorize an increase in any fees?  
No
- c Does the bill reduce total taxes, both rates and revenues?  
No.
- d Does the bill reduce total fees, both rates and revenues?  
No
- e Does the bill authorize any fee or tax increase by any local government?  
No

3. Personal Responsibility.

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?  
N/A
- b Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?  
No.

4. Individual Freedom.

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?  
  
The bill permits certain not-for-profit corporations to act as an attorney in fact. This will permit individuals to seek assistance from these corporations through a durable power of attorney. This is not currently available
- b Does the bill prohibit, or create new government interference with, any presently lawful activity?  
  
N/A

5 Family Empowerment:

- a. If the bill purports to provide services to families or children

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

The bill effects trusts and estates and the beneficiaries of trusts and estates, therefore, it does effect rights and obligations between family members as specified

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

## D SECTION-BY-SECTION RESEARCH

### Section 1.

Section 689 225(2), Florida Statutes, relating to the rule against perpetuities, is amended to provide that language in a governing instrument is inoperative to the extent

that it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives, if, in measuring a period from the creation of a trust or other property arrangement, that language seeks to disallow the vesting or termination of any interest or trust beyond, seeks to postpone the vesting or termination of any interest or trust until, or seeks to operate in effect in any similar fashion upon, the later of

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

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.

The new language is intended to coordinate with the Internal Revenue Service (IRS) position with respect to application of generation skipping transfer tax issues to trusts. The generation skipping tax provisions of the IRS were adopted in Florida in 1995

## **Section 2.**

The bill amends section 709.08, Florida Statutes, to provide that a not-for-profit corporation, organized for charitable or religious purposes, which has qualified as a court-appointed guardian prior to January 1, 1996, and which is a tax-exempt 26 U.S.C. 501(c)(3) corporation, may act as an attorney in fact if the assets of the principal are not used in any way for the benefit of the corporation

## **Section 3.**

The bill amends section 733.707, Florida Statutes, by inserting the missing definition of the term "right of revocation" The term is defined as a power retained by the decedent, held in any capacity, to amend or revoke the trust and revest the principal of the trust in the decedent, or withdraw or appoint the principal of the trust to or for the decedent's benefit

In addition, the bill increases the amount the personal representative or other person can expend for reasonable funeral, interment, and grave marker expenses from \$3,000 to \$6,000.

## **Section 4.**

The bill amends section 737.111, Florida Statutes, to provide that it does not apply to trusts established as part of an employee annuity, an Individual Retirement Account, a Keogh Plan, or a retirement plan. The bill also establishes that the section does not apply to trust instruments executed prior to October 1, 1995.

## **Section 5.**

The bill amends section 737.2041, Florida Statutes, to provide that a trustee and an attorney may agree to compensation different from that provided in the section. The agreement is not binding upon a person who bears the impact of the compensation

unless that person is a party to the agreement "or otherwise consents to be bound by the agreement." Compensation based upon the value of the trust assets and the income earned during initial administration is presumed to be reasonable *total* compensation for ordinary services for *all* attorneys employed to advise the trustee during initial trust administration. If a trustee retains an attorney for limited, specific legal services, compensation is to be as provided in the agreement. If the agreement does not specify compensation, it is to be determined by the factors set out in the subsection providing for court determination of reasonable attorney compensation. Finally, the bill deletes references to corporate fiduciaries, thus subjecting corporate fiduciary trustees to the same provisions as other trustees

#### **Section 6.**

The bill amends section 737.303(4)(c), Florida Statutes, by deleting the term beneficiary, thereby requiring that the trustee give the annual report and other specified reports only to the grantor during the grantor's lifetime

The bill adds a provision that the trustee does not have 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, F S., if the notice or statement of accounts, respectively, is provided to that representative.

#### **Section 7.**

The bill amends section 737 308, Florida Statutes, concerning the trustee's duty to file a notice of trust upon the death of the settlor to require that the clerk send a copy of any caveat filed regarding the settlor to the trustee, and send the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same. This provides a link between the trustee and the caveator when there is no probate estate.

#### **Section 8.**

The bill amends s 518.112, F.S., to provide that 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 pursuant to the provisions below 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.

These requirements notwithstanding, a fiduciary who administers an insurance contract on the lives of one or more persons may delegate specified investment functions, without any continuing obligation to review the agent's actions, to any one or more of a list of specific persons. Additionally, until the contract matures and the policy proceeds are received, a fiduciary that administers insurance contracts under these provisions is not obligated to diversify nor allocate other assets, if any, relative to such insurance contracts

A fiduciary may delegate investment functions to an investment agent as above if:

- \* In the case of a guardianship, the fiduciary has obtained court approval
- \* 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 beneficiaries eligible to receive 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. The discretion to revoke the delegation does not imply any continuing obligation on the part of a fiduciary administering life insurance contracts to review the agent's actions.
- \* Notice to beneficiaries eligible to receive distributions from the trust or the estate, or to their legal representatives, shall be sufficient notice to all persons who may join the eligible class of beneficiaries in the future
- \* As used herein, "legal representative" includes one described in s. 737.303, 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.
- \* Written notice must be 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's principal place of business is located and which requires a signed receipt; as provided by law for service of process, or by an elisor as may be provided in the Florida Rules of Civil Procedure.

If all the foregoing requirements are satisfied, the fiduciary shall not be responsible otherwise for the investment decisions nor actions or omissions of the investment agent to which the investment functions are delegated. In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary. The investment agent shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state

### **Section 9.**

The bill substantially rewords and amends section 733.817, Florida Statutes

Section 733.817(1)(a)-(g), Florida Statutes, amends the definitions of the following terms: governing instrument, included in the measure of the tax, temporary interest, and value. This section creates definitions for the following terms: fiduciary, gross estate, internal revenue code, net tax, nonresiduary devise, nonresiduary interest, recipient, residuary devise, residuary interest, revocable trust, state, tax, and tentative Florida tax

Section 733.817(2), Florida Statutes, provides that an interest in homestead property shall be exempt from the apportionment of taxes if the interest passes to a person to whom inures the decedent's exemption from forced sale under the State Constitution

Section 733.817(3), Florida Statutes, provides that 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 tax measure. However.

(a) The net tax attributable to interests included by reason of s 2044 of the Internal Revenue Code (IRC) shall be determined as provided in the IRC and the amount so determined shall be deducted from the tax to determine the net tax attributable to all remaining interests.

(b) The foreign tax credit 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.

(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 on a property to another state is greater than or equal to the tentative Florida tax attributable to the property, none of the Florida tax is attributable to the property.

2. If the net tax paid on a property to another state is less than the tentative Florida tax attributable to the property, the net Florida tax attributable to the property is the excess of the tentative Florida tax over the tax payable to the other state

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

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

(d) The tax attributable to a temporary interest is regarded as attributable to the principal that supports the temporary interest

(4) Except as otherwise effectively directed by the governing instrument, if the IRC 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. The provisions of this subsection do not affect allocation of the reduction in the Florida tax as provided in this section regarding estates of Florida residents which are also subject to tax in other states.

(5) Except as provided above or as otherwise directed in the governing documents, 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 devisees shall be charged to and paid from the residuary estate. If the residuary estate is insufficient to pay the net tax attributable to all nonresiduary devisees, the balance of the tax shall be apportioned among the recipients of the nonresiduary devisees.

2. The net tax attributable to residuary devisees shall be apportioned among the recipients of residuary devisees

(b) For property passing under the terms of a trust other than a trust created by 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. If the residuary portion is insufficient to pay the net tax attributable to all nonresiduary devisees, the balance of the tax shall be apportioned among the recipients of the nonresiduary interests

2. The net tax attributable to residuary interests shall be apportioned among the recipients of the residuary interests

(c) The net tax attributable to an interest in homestead property shall be apportioned against the recipients of other interests in the estate or passing under any revocable trust.

(d) This apportionment is to be made as if all recipients were taking under a common instrument.

(e) The net tax imposed under s. 4980A of the IRC 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

(f) The net tax that is not apportioned under paragraphs (a), (b), and (c), 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 a court finds it inequitable to apportion the tax as directed by the statutes, it may assess liability for the payment of taxes in the manner it finds equitable

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

(6) A personal representative or fiduciary is not to be required to transfer to a recipient any property which he or she reasonably anticipates may be necessary for payment of taxes nor to transfer any property until the amount of taxes due from the recipient is paid by the recipient.

(7) 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

(8) 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, the personal representative or fiduciary is to recover the deficiency from the

fiduciary in possession of the property to which the tax is proportioned or from the recipient

(9) A personal representative or fiduciary who has the duty of collecting the apportioned tax may be relieved of this duty by order of the court upon specified findings.

(10) Any apportioned tax that is not collected shall be reapportioned as if the portion of the property to which the uncollected tax had been apportioned was 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 that person, to obtain contribution from those who have not paid the full amount of their portion of the tax.

(12) Nothing herein 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

### **Section 10.**

The bill amends section 738.12, Florida Statutes, on underproductive trust property. Under the bill, 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, instead of the trustee paying the income beneficiary an amount equal to 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year, the trustee would pay 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.

The bill adds that, for purposes of the 3 percent calculation, 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.

The bill deletes the existing language on retention of a portion of the income by the trustee.

### **Section 11.**

Section 744.441, Florida Statutes, relating to the power of guardians, is amended to increase the maximum reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate from \$3,000 to \$6,000

### **Section 12.**

Section 655.936, Florida Statutes, relating to safe-deposit box contents is amended to require the initial opening of any safe-deposit box of the decedent to be conducted in the presence of an employee of the institution where the box is located and the personal representative. Likewise, the inventory must be conducted in the presence of the

employee and the personal representative, each of whom must verify the contents. The safe-deposit box inventory must be filed with the court within 10 days after the box is opened.

**Section 13.**

Section 733 604, Florida Statutes, is amended to conform the inventory requirements relating to a safe-deposit box with the new provisions in s 655 936, F S See Section 12 above.

**Section 14.**

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed.

III **FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT**

A. **FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS**

1. **Non-recurring Effects:**

None.

2. **Recurring Effects**

None.

3. **Long Run Effects Other Than Normal Growth**

Unknown.

4. **Total Revenues and Expenditures**

N/A

B **FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE.**

1. **Non-recurring Effects.**

Unknown

2. **Recurring Effects**

The bill requires clerks of court to send a copy of any caveat filed to the trustee and to send the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same. Currently, this does not occur. It is unclear what impact this will have on the clerks of court, however, the impact is expected to be minimal.

3. Long Run Effects Other Than Normal Growth

Unknown

C DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Unknown

2. Direct Private Sector Benefits:

Certain not-for-profit corporations will be able to act as attorneys in fact. This is currently prohibited. The bill clarifies that the provisions requiring that trusts containing testamentary aspects be executed with the formalities of a will are prospective only. This should stop the current practice of some attorneys who are recommending that their clients have their existing trust instruments redrawn to comply with the law as changed in 1995.

3. Effects on Competition, Private Enterprise and Employment Markets

Unknown.

D. FISCAL COMMENTS.

IV CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A APPLICABILITY OF THE MANDATES PROVISION:

Article VII, Section 18 of the Florida Constitution provides in part:

(a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: . . .

If the fiscal impact is insignificant, then the proposed law is exempt from the mandates provision. HB 1411 requires clerks of court to send a copy of any caveat filed 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. Currently, the clerk must file and index the notice of trust and 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 must send a copy to the personal representative.

If, in the aggregate, the bill would have an insignificant fiscal impact, the bill is exempt from the mandates provision. The term "insignificant" means an amount not

greater than the average statewide population for the applicable fiscal year times ten cents For fiscal year 1997-98, a bill that would have a statewide annual fiscal impact on counties and municipalities, in aggregate, of \$1 44 million or less is exempt. According to the Florida Association of Court Clerks and Comptrollers, the impact of this bill will be minimal Therefore, it is the position of the Chair of the Committee on Real Property & Probate, that this bill is exempt from the mandates provision in that the fiscal impact on local governments is insignificant.

**B. REDUCTION OF REVENUE RAISING AUTHORITY:**

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate

**C REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES.**

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

**V COMMENTS:**

**VI AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:**

**VII SIGNATURES:**

**COMMITTEE ON REAL PROPERTY & PROBATE**  
Prepared by Legislative Research Director

P.K. Jameson

P.K. Jameson

**FINAL RESEARCH PREPARED BY COMMITTEE ON REAL PROPERTY & PROBATE:**

Prepared by: Legislative Research Director

P K. Jameson

P.K. Jameson

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1 A bill to be entitled

2 An act relating to the administration of trusts  
3 and estates; amending s. 689.225, F.S.;  
4 providing a statement of the rule against  
5 perpetuities; amending s. 709.08, F.S.;  
6 authorizing certain corporations to serve as an  
7 attorney in fact; amending s. 733.707, F.S.;  
8 defining the term "right of revocation" with  
9 respect to the order of payment of expenses and  
10 obligations of an estate; amending s. 737.111,  
11 F.S.; revising language with respect to  
12 execution requirements for express trusts;  
13 providing for the application of the section;  
14 amending s. 737.2041, F.S., relating to  
15 trustee's attorney's fee; revising procedures  
16 for determining attorney's fees; providing for  
17 determining fees for an attorney who is  
18 retained for limited services; revising the  
19 list of services that constitute ordinary  
20 services in an initial trust administration;  
21 deleting an exception from the applicability of  
22 presumptive fees for a corporate fiduciary that  
23 serves as a trustee or cotrustee; amending s.  
24 737.303, F.S.; revising language with respect  
25 to the duty of the trustee to inform and  
26 account to beneficiaries to require information  
27 to the grantor with respect to certain trusts;  
28 amending s. 733.817, F.S.; revising provisions  
29 of law with respect to the apportionment of  
30 estate taxes; amending s. 738.12, F.S.;  
31 providing conditions under which a trust

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1 beneficiary is considered an income  
2 beneficiary; providing an effective date.

3  
4 Be It Enacted by the Legislature of the State of Florida:

5  
6 Section 1. Paragraph (e) is added to subsection (2) of  
7 section 689.225, Florida Statutes, to read:

8 689.225 Statutory rule against perpetuities.--

9 (2) STATEMENT OF THE RULE.--

10 (e) Language in a governing instrument is inoperative  
11 to the extent that it produces a period of time that exceeds  
12 21 years after the death of the survivor of the specified  
13 lives, if, in measuring a period from the creation of a trust  
14 or other property arrangement, that language seeks to disallow  
15 the vesting or termination of any interest or trust beyond,  
16 seeks to postpone the vesting or termination of any interest  
17 or trust until, or seeks to operate in effect in any similar  
18 fashion upon, the later of:

19 1. The expiration of a period of time not exceeding 21  
20 years after the death of a specified life or the survivor of  
21 specified lives, or upon the death of a specified life or the  
22 death of the survivor of specified lives in being at the  
23 creation of the trust or other property arrangement; or

24 2. The expiration of a period of time that exceeds or  
25 might exceed 21 years after the death of the survivor of lives  
26 in being at the creation of the trust or other property  
27 arrangement.

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

30 709.08 Durable power of attorney.--  
31

1 (2) WHO MAY SERVE AS ATTORNEY IN FACT.--The attorney  
2 in fact must be a natural person who is 18 years of age or  
3 older and is of sound mind, or a financial institution, as  
4 defined in chapter 655, with trust powers, having a place of  
5 business in this state and authorized to conduct trust  
6 business in this state. A not-for-profit corporation,  
7 organized for charitable or religious purposes in this state,  
8 which has qualified as a court-appointed guardian prior to  
9 January 1, 1996, and which is a tax-exempt organization under  
10 26 U.S.C. s. 501(c)(3), may also act as an attorney in fact.  
11 Notwithstanding any contrary clause in the written power of  
12 attorney, no assets of the principal may be used for the  
13 benefit of the corporate attorney in fact, or its officers or  
14 directors.

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

7 733.707 Order of payment of expenses and  
8 obligations.--

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

17 (a) For purposes of this subsection, any trusts  
18 established as part of, and all payments from, either an  
19 employee annuity described in s. 403 of the Internal Revenue  
20 Code of 1986, as amended, an Individual Retirement Account, as  
21 described in s. 408 of the Internal Revenue Code of 1986, as

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1 amended, a Keogh (HR-10) Plan, or a retirement or other plan  
2 established by a corporation which is qualified under s. 401  
3 of the Internal Revenue Code of 1986, as amended, shall not be  
4 considered a trust over which the decedent has a right of  
5 revocation.

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

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

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

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

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

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

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

1 737.111 Execution requirements for express trusts.--

2 (1) The testamentary aspects of a trust defined in s.  
3 731.201(33), are invalid unless the trust instrument is  
4 executed by the settlor with the formalities required for the  
5 execution of a will.

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

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

15 (4) For the purposes of this section, the term  
16 "testamentary aspects" means those provisions of the trust  
17 that dispose of the trust property on or after the death of  
18 the settlor other than to the settlor's estate.

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

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

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

30 737.2041 Trustee's attorney's fees.--  
31

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

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

21           ~~(2)(3)~~ Unless otherwise agreed, compensation for  
22 ordinary services based upon the value of the trust assets  
23 immediately following the settlor's death and the income  
24 earned by the trust during initial administration at the rate  
25 of 75 percent of the schedule provided in s.  
26 733.6171(3)(a)-(h) is presumed to be reasonable total  
27 compensation for ordinary services of all attorneys employed  
28 generally to advise trustees concerning their duties in  
29 initial trust administration.

30           (3) An attorney who is retained to render only limited  
31 and specifically defined legal services shall be compensated

1 as provided in the retaining agreement. If the amount or  
2 method of determining compensation is not provided in the  
3 agreement, the attorney is entitled to a reasonable fee,  
4 taking into account the factors set forth in subsection (6).

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

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

11 (b) Implementation of substitution of the successor  
12 trustee.

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

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

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

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

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

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

31

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

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

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

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

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

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

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

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

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

30 (5) ~~When a corporate fiduciary is serving as trustee~~  
 31 ~~or cotrustee of a trust described in s. 733.707(3), the~~

1 ~~presumptive fee for ordinary services and the list of what~~  
2 ~~constitutes ordinary services in subsections (3) and (4) shall~~  
3 ~~not apply, and what constitutes ordinary services and~~  
4 ~~reasonable compensation for those services shall instead be~~  
5 ~~determined under the particular facts and circumstances~~  
6 ~~applicable to that trust.~~ In addition to the attorney's fees  
7 for ordinary services, the attorney for the trustee shall be  
8 allowed further reasonable compensation for any extraordinary  
9 service. What is an extraordinary service may vary depending  
10 on many factors, including the size of the trust.  
11 Extraordinary services may include, but are not limited to:  
12       (a) Involvement in a trust contest, trust  
13 construction, a proceeding for determination of beneficiaries,  
14 a contested claim, elective share proceedings, apportionment  
15 of estate taxes, or other adversary proceedings or litigation  
16 by or against the trust.  
17       (b) Representation of the trustee in audit or any  
18 proceeding for adjustment, determination, or collection of any  
19 taxes.  
20       (c) Tax advice on postmortem tax planning, including,  
21 but not limited to, disclaimer, renunciation of fiduciary  
22 commission, alternate valuation date, allocation of  
23 administrative expenses between tax returns, the QTIP or  
24 reverse QTIP election, allocation of GST exemption,  
25 qualification for Internal Revenue Code ss. 303 and 6166  
26 privileges, deduction of last illness expenses, distribution  
27 planning, asset basis considerations, throwback rules,  
28 handling income or deductions in respect of a decedent,  
29 valuation discounts, special use and other valuation, handling  
30 employee benefit or retirement proceeds, prompt assessment  
31

1 request, or request for release of personal liability for  
2 payment of tax.

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

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

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

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

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

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

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

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

30 (6) Upon petition of any interested person in a  
31 proceeding to review the compensation paid or to be paid to

1 the attorney for the trustee, the court may increase or  
2 decrease the compensation for ordinary services of the  
3 attorney for the trustee or award compensation for  
4 extraordinary services if the facts and circumstances of the  
5 particular administration warrant. In determining reasonable  
6 compensation, the court shall consider all of the following  
7 factors giving such weight to each as it may determine to be  
8 appropriate:

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

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

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

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

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

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

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

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

27 (i) Any other relevant factors.

28 (7) The court may determine reasonable attorney's  
29 compensation without receiving expert testimony. Any party  
30 may offer expert testimony after notice to interested persons.  
31 If expert testimony is offered, an expert witness fee may be

1 awarded by the court and paid from the assets of the trust.  
2 The court may, in its discretion, direct from what part of the  
3 trust it shall be paid.

4 (8) If a separate written agreement regarding  
5 compensation exists between the attorney and the settlor, the  
6 attorney shall furnish a copy to the trustee prior to  
7 commencement of employment and, if employed, shall promptly  
8 file and serve a copy on all interested persons. Neither a  
9 separate agreement nor a provision in the trust suggesting or  
10 directing the trustee to retain a specific attorney will  
11 obligate the trustee to employ the attorney or obligate the  
12 attorney to accept the representation, but if the attorney who  
13 is a party to the agreement or who drafted the trust is  
14 employed, the compensation paid shall not exceed the  
15 compensation provided in the agreement.

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

23 (10) "Initial trust administration" as used in this  
24 section means administration of a trust described in s.  
25 733.707(3) during the period which begins with the death of  
26 the settlor and ends upon the final distribution of trust  
27 assets outright or to continuing trusts created under the  
28 trust agreement, but if an estate tax return is required, not  
29 until after issuance of an estate tax closing letter or other  
30 evidence of termination of the estate tax proceeding. This  
31

1 initial period is not intended to include continued regular  
2 administration of the trust.

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

5 Section 6. Paragraph (c) of subsection (4) of section  
6 737.303, Florida Statutes, is amended to read:

7 737.303 Duty to inform and account to  
8 beneficiaries.--The trustee shall keep the beneficiaries of  
9 the trust reasonably informed of the trust and its  
10 administration. The trustee's duty to inform and account  
11 includes, but is not limited to, the following:

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

16 Section 7. Section 733.817, Florida Statutes, is  
17 amended to read:

18 (Substantial rewording of section. See

19 s. 733.817, F.S., for present text.)

20 733.817 Apportionment of estate taxes.--

21 (1) For purposes of this section:

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

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

31

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

7           (d) "Included in the measure of the tax" means that  
8 for each separate tax that an interest may incur, only  
9 interests included in the measure of that particular tax are  
10 considered. The term "included in the measure of the tax" does  
11 not include any interest, whether passing under the will or  
12 not, to the extent the interest is initially deductible from  
13 the gross estate, without regard to any subsequent diminution  
14 of the deduction by reason of the charge of any part of the  
15 applicable tax to the interest. The term "included in the  
16 measure of the tax" does not include interests or amounts that  
17 are not included in the gross estate but are included in the  
18 amount upon which the applicable tax is computed, such as  
19 adjusted taxable gifts with respect to the federal estate tax.  
20 If an election is required for deductibility, an interest is  
21 not "initially deductible" unless the election for  
22 deductibility is allowed.

23           (e) "Internal Revenue Code" means the Internal Revenue  
24 Code of 1986, as amended from time to time.

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

1 (g) "Nonresiduary devise" means any devise that is not  
2 a residuary devise.

3 (h) "Nonresiduary interest" in connection with a trust  
4 means any interest in a trust which is not a residuary  
5 interest.

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

5 (j) "Residuary devise" has the meaning set forth in s.  
16 731.201(30).

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

22 (l) "Revocable trust" means a trust as defined in s.  
23 731.201(33) created by the decedent to the extent that the  
24 decedent had at his or her death the power to alter, amend, or  
25 revoke the trust either alone or in conjunction with any other  
26 person.

27 (m) "State" means any state, territory, or possession  
28 of the United States, the District of Columbia, and the  
9 Commonwealth of Puerto Rico.

30 (n) "Tax" means any estate tax, inheritance tax,  
31 generation skipping transfer tax, or other tax levied or

1 assessed under the laws of this or any other state, the United  
2 States, any other country, or any political subdivision of the  
3 foregoing, as finally determined, which is imposed as a result  
4 of the death of the decedent, including, without limitation,  
5 the tax assessed pursuant to s. 4980A of the Internal Revenue  
6 Code. The term also includes any interest and penalties  
7 imposed in addition to the tax. Unless the context indicates  
8 otherwise, the term "tax" means each separate tax.

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

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

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

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

30 (3) The net tax attributable to the interests included  
31 in the measure of each tax shall be determined by the

1 proportion that the value of each interest included in the  
 2 measure of the tax bears to the total value of all interests  
 3 included in the measure of the tax. Notwithstanding the  
 4 foregoing:

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

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

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

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

29 2. If the net tax paid to another state is less than  
 30 the tentative Florida tax attributable to the property subject  
 31 to tax in the other state, the net Florida tax attributable to

1 the property subject to tax in the other state shall be the  
2 excess of the amount of the tentative Florida tax attributable  
3 to the property over the net tax payable to the other state  
4 with respect to the property.

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

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

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

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

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

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

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

2 1. The net tax attributable to nonresiduary devisees  
3 shall be charged to and paid from the residuary estate whether  
4 or not all interests in the residuary estate are included in  
5 the measure of the tax. If the residuary estate is  
6 insufficient to pay the net tax attributable to all  
7 nonresiduary devisees, the balance of the net tax attributable  
8 to nonresiduary devisees shall be apportioned among the  
9 recipients of the nonresiduary devisees in the proportion that  
10 the value of each nonresiduary devise included in the measure  
11 of the tax bears to the total of all nonresiduary devisees  
12 included in the measure of the tax.

13 2. The net tax attributable to residuary devisees shall  
14 be apportioned among the recipients of the residuary devisees  
15 included in the measure of tax in the proportion that the  
16 value of each residuary devise included in the measure of the  
17 tax bears to the total of all residuary devisees included in  
18 the measure of the tax.

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

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

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

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

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

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

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

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

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

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

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

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

26           2. If the decedent's will provides that the tax shall  
27 be apportioned as provided in the decedent's revocable trust  
28 by specific reference to the trust, the direction in the  
29 revocable trust shall be deemed to be a direction contained in  
30 the will and shall control with respect to payment of taxes  
31

1 from assets passing under both the will and the revocable  
2 trust.

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

6 4. For a direction in a governing instrument to be  
7 effective to direct payment of taxes attributable to property  
8 not passing under the governing instrument from property  
9 passing under the governing instrument, the governing  
10 instrument must expressly refer to this section, or expressly  
11 indicate that the property passing under the governing  
12 instrument is to bear the burden of taxation for property not  
13 passing under the governing instrument. A direction in the  
14 governing instrument to the effect that all taxes are to be  
15 paid from property passing under the governing instrument  
16 whether attributable to property passing under the governing  
17 instrument or otherwise shall be effective to direct the  
18 payment from property passing under the governing instrument  
19 of taxes attributable to property not passing under the  
20 governing instrument.

21 5. If there is a conflict as to payment of taxes  
22 between the decedent's will and the governing instrument, the  
23 decedent's will controls, except as follows:

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

27 b. A direction in a governing instrument to pay the  
28 tax attributable to assets that pass pursuant to the governing  
29 instrument from assets that pass pursuant to that governing  
30 instrument shall be effective notwithstanding any conflict  
31 with the decedent's will, unless the tax provision in the

1 decedent's will expressly overrides the conflicting provision  
2 in the governing instrument.

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

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

26 (b) The court shall determine all issues concerning  
27 apportionment. If the tax to be apportioned has not been  
28 finally determined, the court shall determine the probable tax  
29 due or to become due from all interested persons, apportion  
30 the probable tax, and retain jurisdiction over the parties and  
31

1 issues to modify the order of apportionment as appropriate  
2 until after the tax is finally determined.

3 (8)(a) If the personal representative or fiduciary  
4 does not have possession of sufficient property otherwise  
5 distributable to the recipient to pay the tax apportioned to  
6 the recipient, whether under this section, the Internal  
7 Revenue Code, or the governing instrument, if applicable, the  
8 personal representative or fiduciary shall recover the  
9 deficiency in tax so apportioned to the recipient:

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

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

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

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

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

31

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

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

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

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

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

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

26 (11) Nothing in this section shall limit the right of  
27 any person who has paid more than the amount of the tax  
28 apportionable to such person, calculated as if all apportioned  
29 amounts would be collected, to obtain contribution from those  
30 who have not paid the full amount of the tax apportionable to  
31 them, calculated as if all apportioned amounts would be  
collected, and that right is hereby conferred. In any action

1 to enforce contribution, the court shall award taxable costs  
2 as in chancery actions, including reasonable attorney's fees.

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

9 Section 8. Section 738.12, Florida Statutes, is  
10 amended to read:

11 738.12 Underproductive property.--

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

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

28 (c) For purposes of this subsection, a beneficiary is  
29 considered to be an income beneficiary only if the trust  
30 instrument is irrevocable and requires that the net income  
31 from the trust be paid to the beneficiary. Payment under this

1 subsection may not be made to a beneficiary who may receive  
2 trust income only in the discretion of the trustee.

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

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

13 Section 9. This act shall take effect upon becoming a  
14 law, except that section 7 of this act shall take effect  
15 October 1, 1998, and shall apply to the estates of decedents  
16 dying on or after October 1, 1998, and section 8 of this act  
17 shall take effect upon becoming law and shall be applicable to  
18 all trusts, whenever executed.

\*\*\*\*\*

SENATE SUMMARY

Provides a statement of the rule against perpetuities. Modifies various statutes regulating the administration of trusts and estates. Authorizes 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 is a tax-exempt organization to act as an attorney in fact. Defines the term "right of revocation" for purposes of the priority given to the payment of expenses and obligations of a deceased's estate. Revises prescribed requirements for the execution of an expressed trust. Authorizes the trustee of a trust and an attorney to agree to the compensation to be paid to the attorney in an amount different from the amount prescribed in s. 737.2041, F.S., for services related to the initial administration of a trust specified in s. 737.707(3), F.S. Provides for determining fees for an attorney who is retained for limited services. Revises the list of services of an attorney which constitute ordinary services in an initial trust administration. Deletes an exception from the applicability of presumptive fees for a corporate fiduciary serving as a trustee or cotrustee. Revises the duty of a trustee to inform and account to beneficiaries of trusts specified in s. 733.707(3), F.S. Revises provisions relating to the apportionment of estate taxes. Provides conditions under which a trust beneficiary is considered an income beneficiary.

18 2270

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below )

Date: March 13, 1997 Revised: \_\_\_\_\_

Subject: Trusts & Estates/Administration

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	Wiehle <i>vw</i>	Lang <i>HL</i>	JU	
2.				
3.				
4.				
5.				

I. Summary:

The bill provides a definition of "right of revocation" for purposes of determining whether the assets of a trust are liable for the expenses of administration of the decedent's estate and enforceable claims of the decedent's creditors. The bill provides that s. 737.111, F.S., does not apply to specified types of annuities or retirement plans and that the section does not apply to trust instruments executed prior to October 1, 1995. It also provides that the trustee of a trust with a right of revocation need not report to the beneficiaries during the grantor's lifetime.

The bill also provides that a not-for-profit corporation may act as an attorney in fact; provides for the compensation of an attorney for a trustee; provides a new element of the rule against perpetuities; revises the statute on underproductive trust property; and provides for apportionment of estate taxes.

This bill substantially amends the following sections of the Florida Statutes: 689.225, 709.08, 733 707, 737.111, 737.2041, 737 303, 733.817, and 738.12.

II. Present Situation:

Rule Against Perpetuities

Section 689.225, F.S., is the "Florida Uniform Statutory Rule Against Perpetuities." Subsection (2) provides a statement of the rule:

- A nonvested property interest in real or personal property is invalid unless: when the interest is created, it is certain to vest or terminate no later than 21 years after the death

of an individual then alive; or the interest either vests or terminates within 90 years after its creation.

- A general power of appointment not presently exercisable because of a condition precedent is invalid unless: when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.
- A nongeneral power of appointment or a general testamentary power of appointment is invalid unless: when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or the power is irrevocably exercised or otherwise terminates within 90 years after its creation.
- In determining whether a nonvested property interest or a power of appointment is valid, the possibility that a child will be born to an individual after the individual's death is disregarded

### **Probate**

Section 733.707, F.S., provides for the personal representative's payment of the expenses of the administration and obligations of the estate. Section 733.707(3), F.S., provides that 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 (c)*, 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. Paragraph (c) contains no definitions.

Section 733.707(3)(a), F.S., provides that, for purposes of subsection (3), 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, are not to be considered a trust over which the decedent has a right of revocation.

Section 737.111, F.S., was enacted in 1995 and took effect October 1, 1995. Ch. 95-401, s. 11, at 3287, Laws of Fla. The section provides that the testamentary aspects of a trust are invalid unless the trust is executed with the formalities required for the execution of a will. Also, the testamentary aspects of an amendment to a trust are invalid unless the amendment is executed with the same formalities as a will. For the purposes of this section, the term "testamentary aspects" means those provisions of the trust that dispose of the trust property on the death of the settlor other than to the settlor's estate.

Section 737.303, F.S., sets out the duty of a trustee to inform and account to beneficiaries. The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. A beneficiary is entitled to a statement of the accounts of the trust annually and upon termination of the trust or upon change of the trustee except that, in the case of a trust described in s. 733.707(3), F.S., the trustee's duties extend only to the grantor or beneficiary or the legal representative of the grantor or beneficiary during the grantor's lifetime.

### **Durable Power of Attorney**

Prior to October 1, 1995, the durable power of attorney statute did not prescribe or limit who could serve as an attorney in fact. As amended in 1995, the statute limits who can serve to either 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. Ch. 95-401, s. 17, at 3292, Laws of Fla.

### **Trustee's Attorney's Fees**

Section 737.2041, F.S., provides that the attorney retained by the trustee of a trust described in s. 733.707(3), F.S., is entitled to reasonable compensation for legal services rendered in the initial administration of the trust payable from the assets of the trust without court order. 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.

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), F.S., is presumed to be reasonable compensation for attorneys in initial trust administration. The section provides that ordinary services of the attorney for a trustee include legal advice and representation relating to a list of possible duties of the trustee

When a corporate fiduciary is serving as trustee or cotrustee, the presumptive fee for ordinary services and the list of what constitutes ordinary services does not apply, and what constitutes ordinary services and reasonable compensation for those services is instead 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 is 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. The statute sets forth a list of some services which constitute extraordinary services.

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 is to consider all of a list of factors set forth in the section, giving such weight to each as it may determine to be appropriate.

### **Apportionment of Estate Tax**

Section 733.817, F.S., provides for apportionment of estate taxes. Any estate or other death tax shall be apportioned in the following manner:

If a part of the estate passed under a will by reference to a specific property or in any other nonresiduary form, exclusive of property over which the decedent had a power of appointment as defined from time to time under the estate tax laws of the United States, the net amount of the tax attributable to it shall be charged to and paid from the residuary estate without requiring contribution from persons receiving the interests, except as otherwise directed by the governing instrument. In the event the residuary estate is insufficient to pay the tax attributable to the interests, any balance of the tax shall be equitably apportioned among the recipients of the interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interests so included, except as otherwise directed by the governing instrument.

If a part of the estate passed under the will as a residuary interest, exclusive of property over which the decedent had power of appointment, the net amount of tax attributable to it shall be equitably apportioned among the residuary beneficiaries in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests so included, except as otherwise directed by the governing instrument. When a residuary interest is a temporary interest, the tax attributable to it shall be charged to corpus and not apportioned between temporary and remainder interests

If a part of the property concerning which the tax is levied or assessed is held under the terms of any trust created inter vivos, then, unless the governing instrument directs otherwise.

- If any portion of the trust is directed to pass or to be held in further trust by reference to a specific property, or type of property, fund, sum, or statutory amount, or in any other nonresiduary form, the net amount of the tax attributable to that portion must be charged to and paid from the corpus of the residuary share of the trust without requiring contribution from the nonresiduary interest or the persons receiving or benefiting from that interest. If the residuary portion of the trust is insufficient to pay the tax attributable to all nonresiduary interests, any balance of the tax must be equitably apportioned among the recipients of those interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interest so included.
- The net amount of the tax directly attributable to the residuary share of the trust, if any, must be charged as follows: the net amount of the tax attributable to each residuary temporary interest must be charged to that portion of residuary principal that supports the temporary interest without apportionment, and the net amount of the tax attributable to the balance of the residuary share must be equitably apportioned among the residuary beneficiaries, by charge to the corpus of their interest in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests included.

Real property or mobile home homesteads that are exempt from execution by law shall be exempt from apportionment of taxes. Persons taking an interest in the homesteads shall not be liable for apportionment of taxes on account of the homesteads. The net amount of the tax attributable to homestead property shall be paid from other assets of any trust or the estate subject to administration in the order as directed by the governing instrument or, absent this direction, in the following order:

- Property not disposed of by the will or trust.
- Property passing as the residuary estate.
- Property not specifically or demonstratively devised.
- Property specifically or demonstratively devised.

The balance of the net amount of the tax shall be equitably apportioned among, and paid by, the recipients and beneficiaries of the properties or interests, in the proportion that the value of the property or interest of each included in the measure of the tax bears to the total value of all the properties and interests included in the measure of the tax, except as otherwise directed by the governing instrument. With respect to a temporary interest not in trust, the amount charged to the recipients or beneficiaries shall not be apportioned between temporary and remainder interests but shall be charged to and paid out of the corpus of the property or fund, except as otherwise directed by the governing instrument.

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

A direction against apportionment under this section may be explicit or implicit from the terms of the governing instrument, but must be clear and unequivocal; provided, however, that an implicit direction against apportionment is not sufficient to avoid the apportionment under state or applicable federal law unless the court also finds that the testator considered and made a deliberate and informed decision about the burden of taxation.

No personal representative or other fiduciary shall be required to transfer any property until the amount of any tax due from the transferee is paid or, if the apportionment of tax has not been determined, until adequate security is furnished for the payment. The fiduciary shall not be required to distribute assets that he reasonably anticipates may be necessary to pay any state or federal taxes.

After the amount of all estate, inheritance, and death taxes is finally determined, the personal representative or other fiduciary shall petition for an order of apportionment and shall give formal notice of the petition and the hearing to all interested persons.

### **Underproductive Property**

Section 738.12, F.S., provides for underproductive trust property. 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 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year. This amount shall be paid to the income beneficiary using the first principal cash available.

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. Upon the sale of the property the income beneficiary shall not be entitled to any portion of the proceeds of sale, except any amount previously owing and unpaid from the 3 percent of principal computation above sale shall be paid therefrom.

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 the 3 percent of principal computation above shall be retained or disposed of as provided by the terms of the trust.

## **III. Effect of Proposed Changes:**

### **Rule Against Perpetuities**

The bill adds to s. 689.225(2) an additional element of the rule against perpetuities, that being that language in a governing instrument is inoperative to the extent that it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives, if, in measuring a period from the creation of a trust or other property arrangement, that language seeks to disallow the vesting or termination of any interest or trust beyond, seeks to postpone the vesting or termination of any interest or trust until, or seeks to operate in effect in any similar fashion upon, the later of:

- 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

- 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.

### **Probate**

The bill amends s. 733.707, F.S., by inserting the missing definition of the term “right of revocation.” The term is defined as a power retained by the decedent, held in any capacity, to: amend or revoke the trust and revest the principal of the trust in the decedent; or withdraw or appoint the principal of the trust to or for the decedent’s benefit.

The bill amends s. 737.111, F.S., to provide that it does not apply to trusts established as part of an employee annuity, an Individual Retirement Account, a Keogh Plan, or a retirement plan. The bill also establishes that the section does not apply to trust instruments executed prior to October 1, 1995.

The bill amends s. 737.303(4)(c), F.S., by deleting the term beneficiary, thereby requiring that the trustee give the annual report and other specified reports only to the grantor during the grantor’s lifetime.

### **Durable Power of Attorney**

The bill amends s. 709.08, F.S., to provide that a not-for-profit charitable corporation may act as an attorney in fact if the assets of the principal are not used in any way for the benefit of the corporation.

### **Trustee’s Attorney’s Fees**

The bill amends s. 737.2041, F.S., to provide that a trustee and an attorney may agree to compensation different from that provided in the section. The agreement is not binding upon a person who bears the impact of the compensation unless that person is a party to the agreement “or otherwise consents to be bound by the agreement.” Compensation based upon the value of the trust assets and the income earned during initial administration is presumed to be reasonable *total* compensation for *all* attorneys employed to advise the trustee during initial trust administration. If a trustee retains an attorney for limited, specific legal services, compensation is to be as provided in the agreement. If the agreement does not specify compensation, it is to be determined by the factors set out in the subsection providing for court determination of reasonable attorney compensation. Finally, the bill deletes references to corporate fiduciaries, thus subjecting corporate fiduciary trustees to the same provisions as other trustees.

### **Apportionment of Estate Tax**

The bill amends s. 733.817, F.S., to provide that 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 tax measure. However:

- The net tax attributable to interests included by reason of s 2044 of the Internal Revenue Code (IRC) shall be determined as provided in the IRC and the amount so determined shall be deducted from the tax to determine the net tax attributable to all remaining interests.
- The foreign tax credit 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.
- The reduction in the Florida tax on the estate of a Florida resident for tax paid to other states shall be allocated as follows:
  - If the tax paid on a property to another state is greater than or equal to the tentative Florida tax attributable to the property, none of the Florida tax is attributable to the property.
  - If the tax paid on a property to another state is less than the tentative Florida tax attributable to the property, the Florida tax attributable to the property is the excess of the tentative Florida tax over the tax payable to the other state.
  - Any remaining Florida tax shall be attributable to property included exclusive of property taxable in other states
- The tax attributable to a temporary interest is regarded as attributable to the principal that supports the temporary interest

Except as provided above or as otherwise directed in the governing documents, the net tax attributable to each interest shall be apportioned as follows.

- For property passing under the decedent's will:
  - The net tax attributable to nonresiduary devisees shall be charged to and paid from the residuary estate. If the residuary estate is insufficient to pay the net tax attributable to all nonresiduary devisees, the balance of the tax shall be apportioned among the recipients of the nonresiduary devisees.
  - The net tax attributable to residuary devisees shall be apportioned among the recipients of residuary devisees.

- For property passing under the terms of a trust other than a trust created by the decedent's will:
  - The net tax attributable to nonresiduary interests shall be charged to and paid from the residuary portion of the trust. If the residuary portion is insufficient to pay the net tax attributable to all nonresiduary devisees, the balance of the tax shall be apportioned among the recipients of the nonresiduary interests.
  - The net tax attributable to residuary interests shall be apportioned among the recipients of the residuary interests.
- The net tax attributable to an interest in homestead property shall be apportioned against the recipients of other interests in the estate or passing under any revocable trust.
- This apportionment is to be made as if all recipients were taking under a common instrument.
- If a court finds it inequitable to apportion the tax as directed by the statutes, it may assess liability for the payment of taxes in the manner it finds equitable.
- To be effective as a direction for payment of tax in a manner different from that provided, the governing instrument must direct that the tax be paid from assets which pass pursuant to the governing instrument.

A personal representative or fiduciary is not to be required to transfer to a recipient any property which he or she reasonably anticipates may be necessary for payment of taxes nor to transfer any property until the amount of taxes due from the recipient is paid by the recipient.

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.

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, the personal representative or fiduciary is to recover the deficiency from the fiduciary in possession of the property to which the tax is apportioned or from the recipient.

A personal representative or fiduciary who has the duty of collecting the apportioned tax may be relieved of this duty by order of the court.

Any apportioned tax that is not collected shall be reapportioned as if the portion of the property to which the uncollected tax had been apportioned was exempt.

**Underproductive Property**

The bill amends s. 738.12, F.S., on underproductive trust property. Under the bill, 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, instead of the trustee paying the income beneficiary an amount equal to 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year, the trustee would pay 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.

The bill adds that, for purposes of the 3 percent calculation, 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.

The bill deletes the existing language on retention of a portion of the income by the trustee.

**Effective Date**

The bill takes effect upon becoming a law, except that section 7, concerning apportionment of estate taxes, takes effect October 1, 1998, and applies to the estates of decedents dying on or after October 1, 1998, and section 8 takes effect upon becoming law and is applicable to all trusts, whenever executed.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

The bill specifically provides that the amendments to the underproductive trust property statute are to be applicable to all trusts, whenever executed. Under the case law discussed in

below in Section VII, any such application which impaired pre-existing contracts would be subject to constitutional challenge.

Under the case law discussed in below in Section VII, the new element of the rule against perpetuities would apply prospectively only. Additionally, any attempt to apply this provision to invalidate existing instruments would be subject to challenge as an unconstitutional impairment of pre-existing contracts.

**V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Indeterminate.

**C. Government Sector Impact**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

It is well established that in the absence of clear legislative expression to the contrary, legislation is presumed to operate prospectively. *e.g.*, *Walker & LaBerge, Inc v. Halligan*, 344 So.2d 239, 241 (Fla. 1977); *Fleeman V. Case*, 342 So.2d 815, 817 (Fla. 1977); and *Dewberry v. Auto-Owners Insurance Company*, 363 So.2d 1077, 1079 (Fla. 1978) Additionally, Article I, Section 10 of both the United States and Florida Constitutions prohibit the retroactive application of a statute when such application would impair the obligations of contract. *See Fleeman; Dewberry; and Castellano v Cosgrove*, 280 So.2d 676 (Fla. 1973).

The *Castellano* case is a good example of the application of this law to an attempted retroactive application of a statute. In January 1968, Nicholas Castellano executed a savings account discretionary revocable trust agreement with a savings and loan association, which issued a certificate of savings in the name of "Nicholas Castellano as trustee for Angela Castellano". *Castellano*, at 677. On July 1, 1969, a statute became effective which provided that when the settlor of a trust is the sole trustee, the trust instrument must be executed with the formalities for the execution of a will. *Id.* The legislation enacting the statute provided that it was to apply to trusts executed before, on, or after the effective date of the legislation. *Id.* Nicholas Castellano

died intestate in September 1969, survived by his daughter, Angela Castellano, and his widow, the appellant. *Id.* Appellant contested the trust based on the new statute as the trust documents had not been executed in the presence of two verifying witnesses. *Id.* The trial court held the statute unconstitutional as applied to the preexisting trust as the trust agreement was a contract in being which could not be impaired under either the Florida or the Federal Constitution. *Id.* The Florida Supreme Court agreed and affirmed. *Id.*

Staff has received reports that some lawyers have contacted their clients who have trusts with testamentary aspects and informed them that s. 737.111 requires that they execute a new trust, for a fee.

**VIII. Amendments:**

None.

Judiciary  
 Wednesday, April 2, 1997  
 2:30 P.M. - 5:30 P.M.  
 Room 1 (309), Capitol

18 2273

ITEM	SPEAKER/COMMENTS	TAPE/CNTR#	ITEM	SPEAKER/COMMENTS	TAPE/CNTR#
			SB 806	Peter Fodor	2a
			"	Bill Herrle	2a
			"	Ben Parks	2a
			"	Martha Nibelsick	2a
			"	George Koikes	1b
			SB 914	Sen. Silver	1b
			"	Iver Hamb	1b
			SB 902	Sen. Silver	1b
			"	Sen. Silver	2b
			"	Rheb Harrison	2b
			SB 650	Sen. Dudley	2b
			"	Carl A. Bertoch	2b
			"	Jim Mullins	2b
			SB 652	Sen. Dudley	2b
			SB 930	Rep. Rodriguez-Chenat	2b

ITEM	SPEAKER/COMMENTS	TAPE/CNTR#
SB 722	Sen. Horne	1a
CS/SB 248	Sen. Burt	1a
SB 818	Sen. Grant	1a
"	Linda McMullen	1a
CS/SB 248	Sen. Burt	1a
SB 806	Sen. Grant	1a
"	Carey Gaylord	1a
"	Ken Towcimak	1a
"	Ken Towcimak	2a
"	Alex Whidley	2a
"	Thomas Goldstein	2a
"	Warren Husband	2a

By Senator Lee

23-809-97

1                                   A bill to be entitled  
2           An act relating to a durable power of attorney;  
3           amending s. 709.08, F.S.; authorizing certain  
4           corporations to act as an attorney in fact;  
5           providing a limitation; providing an effective  
6           date.

7  
8 Be It Enacted by the Legislature of the State of Florida:

9  
10           Section 1. Subsection (2) of section 709.08, Florida  
11 Statutes, is amended to read:

12           709.08 Durable power of attorney.--

13           (2) WHO MAY SERVE AS ATTORNEY IN FACT.--The attorney  
14 in fact must be a natural person who is 18 years of age or  
15 older and is of sound mind, or a financial institution, as  
16 defined in chapter 655, with trust powers, having a place of  
17 business in this state and authorized to conduct trust  
18 business in this state. A not-for-profit corporation,  
19 organized for charitable or religious purposes in this state,  
20 which has qualified as a court-appointed guardian prior to  
21 January 1, 1996, and which is a tax-exempt organization under  
22 26 U.S.C. s. 501(c)(3), may also act as an attorney in fact.  
23 Notwithstanding any contrary clause in the written power of  
24 attorney, no assets of the principal may be used for the  
25 benefit of the corporate attorney in fact, or its officers or  
26 directors.

27           Section 2. This act shall take effect July 1, 1997.  
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SENATE SUMMARY

Provides that certain not-for-profit corporations may act as an attorney in fact. Provides that no assets of the principal may be used for the benefit of the corporate attorney in fact, or its officers or directors.

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By Senator Dudley

25-859-97

A bill to be entitled

An act relating to the administration of estates; amending s. 733.707, F.S.; providing liability of certain trusts for paying expenses of administering a decedent's estate and enforceable claims of creditors, to the extent that the estate is insufficient to pay such claims; providing an effective date.

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

Section 1. 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) ~~(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, is shall not

1 ~~be-considered~~ a trust over which the decedent has a right of  
2 revocation.

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

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

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

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

23 1. To amend or revoke the trust and revest principal  
24 of the trust in the decedent; or

25 2. To withdraw or appoint principal of the trust to or  
26 for the decedent's benefit.

27 Section 2. This act shall take effect July 1, 1997.  
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SENATE SUMMARY

Provides that a trust is liable for certain expenses of administering a decedent's estate and for paying enforceable claims of creditors if, at the time of death, the decedent held the right to amend or revoke the trust and re-vest principal of the trust in the decedent, or held the right to withdraw or appoint principal of the trust to or for the decedent's benefit.

By the Committee on Judiciary and Senators Grant, Lee and  
Dudley

308-1834-97

1 A bill to be entitled

2 An act relating to the administration of trusts  
3 and estates; amending s. 689.225, F.S.;  
4 providing a statement of the rule against  
5 perpetuities; amending s. 709.08, F.S.;  
6 authorizing certain corporations to serve as an  
7 attorney in fact; amending s. 733.707, F.S.;  
8 increasing the ceiling on funeral expenses;  
9 defining the term "right of revocation" with  
10 respect to the order of payment of expenses and  
11 obligations of an estate; amending s. 737.111,  
12 F.S.; revising provisions with respect to  
13 execution requirements for express trusts;  
14 providing for the application of the section;  
15 amending s. 737.2041, F.S., relating to  
16 trustee's attorney's fee; revising procedures  
17 for determining attorney's fees; providing for  
18 determining fees for an attorney who is  
19 retained for limited services; revising the  
20 list of services that constitute ordinary  
21 services in an initial trust administration;  
22 deleting an exception from the applicability of  
23 presumptive fees for a corporate fiduciary that  
24 serves as a trustee or cotrustee; amending s.  
25 737.303, F.S.; revising provisions with respect  
26 to the duty of the trustee to inform and  
27 account to beneficiaries to require information  
28 to the grantor with respect to certain trusts;  
29 amending s. 733.08, F.S.; providing for  
30 specified notice to the trustee and caveator;  
31 amending s. 518.112, F.S.; providing for

1 delegation of investment functions; amending s.  
2 733.817, F.S.; revising provisions of law with  
3 respect to the apportionment of estate taxes;  
4 amending s. 738.12, F.S.; providing conditions  
5 under which a trust beneficiary is considered  
6 an income beneficiary; amending s. 744.441,  
7 F.S.; increasing the ceiling on funeral  
8 expenses; providing an effective date.

9  
10 Be It Enacted by the Legislature of the State of Florida:

11  
12 Section 1. Paragraph (e) is added to subsection (2) of  
13 section 689.225, Florida Statutes, to read:

14 689.225 Statutory rule against perpetuities.--

15 (2) STATEMENT OF THE RULE.--

16 (e) Language in a governing instrument is inoperative  
17 to the extent that it produces a period of time that exceeds  
18 21 years after the death of the survivor of the specified  
19 lives, if, in measuring a period from the creation of a trust  
20 or other property arrangement, that language seeks to disallow  
21 the vesting or termination of any interest or trust beyond,  
22 seeks to postpone the vesting or termination of any interest  
23 or trust until, or seeks to operate in effect in any similar  
24 fashion upon, the later of:

25 1. The expiration of a period of time not exceeding 21  
26 years after the death of a specified life or the survivor of  
27 specified lives, or upon the death of a specified life or the  
28 death of the survivor of specified lives in being at the  
29 creation of the trust or other property arrangement; or

30 2. The expiration of a period of time that exceeds or  
31 might exceed 21 years after the death of the survivor of lives

1 in being at the creation of the trust or other property  
2 arrangement.

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

5 709.08 Durable power of attorney.--

6 (2) WHO MAY SERVE AS ATTORNEY IN FACT.--The attorney  
7 in fact must be a natural person who is 18 years of age or  
8 older and is of sound mind, or a financial institution, as  
9 defined in chapter 655, with trust powers, having a place of  
10 business in this state and authorized to conduct trust  
11 business in this state. A not-for-profit corporation,  
12 organized for charitable or religious purposes in this state,  
13 which has qualified as a court-appointed guardian prior to  
14 January 1, 1996, and which is a tax-exempt organization under  
15 26 U.S.C. s. 501(c)(3), may also act as an attorney in fact.  
16 Notwithstanding any contrary clause in the written power of  
17 attorney, no assets of the principal may be used for the  
18 benefit of the corporate attorney in fact, or its officers or  
19 directors.

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

22 733.707 Order of payment of expenses and  
23 obligations.--

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

27 (a) Class 1.--Costs, expenses of administration, and  
28 compensation of personal representatives and their attorneys'  
29 fees.

30 (b) Class 2.--Reasonable funeral, interment, and grave  
31 marker expenses, whether paid by a guardian under s.

1 744.441(16), the personal representative, or any other person,  
2 not to exceed the aggregate of \$6,000 ~~\$3,000~~.

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

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

8 (e) Class 5.--Family allowance.

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

11 (g) Class 7.--Debts acquired after death by the  
12 continuation of the decedent's business, in accordance with s.  
13 733.612(22), but only to the extent of the assets of that  
14 business.

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

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

27 (a) For purposes of this subsection, any trusts  
28 established as part of, and all payments from, either an  
29 employee annuity described in s. 403 of the Internal Revenue  
30 Code of 1986, as amended, an Individual Retirement Account, as  
31 described in s. 408 of the Internal Revenue Code of 1986, as

1 amended, a Keogh (HR-10) Plan, or a retirement or other plan  
2 established by a corporation which is qualified under s. 401  
3 of the Internal Revenue Code of 1986, as amended, shall not be  
4 considered a trust over which the decedent has a right of  
5 revocation.

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

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

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

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

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

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

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

1 737.111 Execution requirements for express trusts.--

2 (1) The testamentary aspects of a trust defined in s.  
3 731.201(33), are invalid unless the trust instrument is  
4 executed by the settlor with the formalities required for the  
5 execution of a will.

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

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

15 (4) For the purposes of this section, the term  
16 "testamentary aspects" means those provisions of the trust  
17 that dispose of the trust property on or after the death of  
18 the settlor other than to the settlor's estate.

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

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

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

30 737.2041 Trustee's attorney's fees.--  
31

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

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

21           (2)(f) Unless otherwise agreed, compensation for  
22 ordinary services based upon the value of the trust assets  
23 immediately following the settlor's death and the income  
24 earned by the trust during initial administration at the rate  
25 of 75 percent of the schedule provided in s.  
26 733.6171(3)(a)-(h) is presumed to be reasonable total  
27 compensation for ordinary services of all attorneys employed  
28 generally to advise trustees concerning their duties in  
29 initial trust administration.

30           (3) An attorney who is retained to render only limited  
31 and specifically defined legal services shall be compensated

1 as provided in the retaining agreement. If the amount or  
2 method of determining compensation is not provided in the  
3 agreement, the attorney is entitled to a reasonable fee,  
4 taking into account the factors set forth in subsection (6).

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

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

11 (b) Implementation of substitution of the successor  
12 trustee.

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

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

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

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

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

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

31

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

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

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

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

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

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

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

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

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

30 ~~(5) When a corporate fiduciary is serving as trustee~~  
31 ~~or cotrustee of a trust described in s. 733.707(3), the~~

1 ~~presumptive fee for ordinary services and the list of what~~  
2 ~~constitutes ordinary services in subsections (3) and (4) shall~~  
3 ~~not apply, and what constitutes ordinary services and~~  
4 ~~reasonable compensation for those services shall instead be~~  
5 ~~determined under the particular facts and circumstances~~  
6 ~~applicable to that trust.~~ In addition to the attorney's fees  
7 for ordinary services, the attorney for the trustee shall be  
8 allowed further reasonable compensation for any extraordinary  
9 service. What is an extraordinary service may vary depending  
10 on many factors, including the size of the trust.  
11 Extraordinary services may include, but are not limited to:  
12       (a) Involvement in a trust contest, trust  
13 construction, a proceeding for determination of beneficiaries,  
14 a contested claim, elective share proceedings, apportionment  
15 of estate taxes, or other adversary proceedings or litigation  
16 by or against the trust.  
17       (b) Representation of the trustee in audit or any  
18 proceeding for adjustment, determination, or collection of any  
19 taxes.  
20       (c) Tax advice on postmortem tax planning, including,  
21 but not limited to, disclaimer, renunciation of fiduciary  
22 commission, alternate valuation date, allocation of  
23 administrative expenses between tax returns, the QTIP or  
24 reverse QTIP election, allocation of GST exemption,  
25 qualification for Internal Revenue Code ss. 303 and 6166  
26 privileges, deduction of last illness expenses, distribution  
27 planning, asset basis considerations, throwback rules,  
28 handling income or deductions in respect of a decedent,  
29 valuation discounts, special use and other valuation, handling  
30 employee benefit or retirement proceeds, prompt assessment  
31

1 request, or request for release of personal liability for  
2 payment of tax.

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

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

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

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

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

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

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

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

30 (6) Upon petition of any interested person in a  
31 proceeding to review the compensation paid or to be paid to

1 the attorney for the trustee, the court may increase or  
2 decrease the compensation for ordinary services of the  
3 attorney for the trustee or award compensation for  
4 extraordinary services if the facts and circumstances of the  
5 particular administration warrant. In determining reasonable  
6 compensation, the court shall consider all of the following  
7 factors giving such weight to each as it may determine to be  
8 appropriate:

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

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

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

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

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

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

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

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

27 (i) Any other relevant factors.

28 (7) The court may determine reasonable attorney's  
29 compensation without receiving expert testimony. Any party  
30 may offer expert testimony after notice to interested persons.  
31 If expert testimony is offered, an expert witness fee may be

1 awarded by the court and paid from the assets of the trust.  
2 The court may, in its discretion, direct from what part of the  
3 trust it shall be paid.

4 (8) If a separate written agreement regarding  
5 compensation exists between the attorney and the settlor, the  
6 attorney shall furnish a copy to the trustee prior to  
7 commencement of employment and, if employed, shall promptly  
8 file and serve a copy on all interested persons. Neither a  
9 separate agreement nor a provision in the trust suggesting or  
10 directing the trustee to retain a specific attorney will  
11 obligate the trustee to employ the attorney or obligate the  
12 attorney to accept the representation, but if the attorney who  
13 is a party to the agreement or who drafted the trust is  
14 employed, the compensation paid shall not exceed the  
15 compensation provided in the agreement.

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

23 (10) "Initial trust administration" as used in this  
24 section means administration of a trust described in s.  
25 733.707(3) during the period which begins with the death of  
26 the settlor and ends upon the final distribution of trust  
27 assets outright or to continuing trusts created under the  
28 trust agreement, but if an estate tax return is required, not  
29 until after issuance of an estate tax closing letter or other  
30 evidence of termination of the estate tax proceeding. This  
31

1 initial period is not intended to include continued regular  
2 administration of the trust.

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

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

7 737.303 Duty to inform and account to  
8 beneficiaries.--The trustee shall keep the beneficiaries of  
9 the trust reasonably informed of the trust and its  
10 administration. The trustee's duty to inform and account  
11 includes, but is not limited to, the following:

12 (4)

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

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

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

30 737.308 Notice of trust.--  
31

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

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

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

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

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

22 ~~(6)(5)~~ In any proceeding affecting the expenses of the  
23 administration of the estate, or any claims described in s.  
24 733.702(1), the trustee of a trust described in s. 733.707(3)  
25 is an interested person in the administration of the grantor's  
26 estate.

27 ~~(7)(6)~~ Any proceeding affecting the expenses of the  
28 administration of the estate or any claims described in s.  
29 733.702(1) prior to the trustee filing a notice of trust are  
30 binding upon the trustee.

31

1           (8)(7) The trustee's failure to file the notice of  
2 trust does not affect the trustee's obligation to pay expenses  
3 of administration and enforceable claims as provided in s.  
4 733.607(2).

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

7           518.112 Delegation of investment functions.--

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

20           (2)(a) The requirements of subsection (1)  
21 notwithstanding, a fiduciary that administers an insurance  
22 contract on the life or lives of one or more persons may  
23 delegate without any continuing obligation to review the  
24 agent's actions, certain investment functions with respect to  
25 any such contract as provided in subsection (3), to any one or  
26 more of the following persons as investment agents:

27           1. The trust's settlor if the trust is one described  
28 in s. 733.707(3);

29           2. Beneficiaries of the trust or estate, regardless of  
30 the beneficiary's interest therein, whether vested or  
31 contingent;

1           3. The spouse, ancestor, or descendant of any person  
2 described in subparagraphs 1. or 2.;

3           4. Any person or entity nominated by a majority of the  
4 beneficiaries entitled to receive notice under subsection  
5 (3)(b); or

6           5. An investment agent if the fiduciary exercises  
7 reasonable care, judgment, and caution in selecting the  
8 investment agent and in establishing the scope and specific  
9 terms of any delegation.

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

12           1. A determination of whether any insurance contract  
13 is or remains a proper investment;

14           2. A determination of whether or not to exercise any  
15 policy option available under such contracts;

16           3. A determination of whether or not to diversify such  
17 contracts relative to one another or to other assets, if any,  
18 administered by the fiduciary; or

19           4. An inquiry about changes in the health or financial  
20 condition of the insured or insureds relative to any such  
21 contract.

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

27           ~~(3)(2)~~ A fiduciary may delegate investment functions  
28 to an investment agent under subsections (1) or (2) pursuant  
29 to ~~subsection (4)~~, if:

30           ~~(a) The fiduciary exercises reasonable care, judgment,~~  
31 ~~and caution in selecting the investment agent, in establishing~~

~~1 the scope and specific terms of any delegation, and in~~  
~~2 reviewing periodically the agent's actions in order to monitor~~  
~~3 overall performance and compliance with the scope and specific~~  
~~4 terms of the delegation.~~

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

7       ~~(b)(c)~~ In the case of a trust or estate, the fiduciary  
8 has given written notice, of its intention to begin delegating  
9 investment functions under this section, to all the  
10 beneficiaries, or their legal representative, eligible to  
11 receive ~~income from the trust or~~ distributions from the trust  
12 or estate within 30 days of the delegation unless such notice  
13 is waived by the eligible beneficiaries entitled to receive  
14 such notice. This notice shall thereafter, until or unless  
15 the beneficiaries eligible to receive income from the trust or  
16 distributions from the estate at the time are notified to the  
17 contrary, authorize the trustee or legal representative to  
18 delegate investment functions pursuant to this subsection.  
19 This discretion to revoke the delegation does not imply under  
20 subsection (2) any continuing obligation to review the agent's  
21 actions.

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

27       2. Additionally, as used herein, legal representative  
28 includes one described in s. 731.303, without any requirement  
29 of a court order, an attorney-in-fact under a durable power of  
30 attorney sufficient to grant such authority, a legally  
31 appointed guardian, or equivalent under applicable law, any

1 living, natural guardian of a minor child, or a guardian ad  
2 litem. In the case of a minor, notice may be sent to a parent  
3 or legal guardian of the minor.

4 3. Written notice shall be:

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

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

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

13  
14 Notice by mail or by approved commercial delivery service is  
15 complete on receipt of notice. Proof of notice must be by  
16 verified statement of the person mailing or sending notice,  
17 and there must be attached thereto the signed receipt or other  
18 satisfactory evidence that delivery was effected on the  
19 addressee or on the addressee's agent. Proof of notice must be  
20 maintained among the trustee's permanent records. In the case  
21 of an otherwise incapacitated person, notice may be given to  
22 the guardian of such person or to such person's donee under a  
23 durable power of attorney that is sufficient to grant such  
24 authority.

25 (4)(3) If all requirements of subsection (3)(2) are  
26 satisfied, the fiduciary shall not be responsible otherwise  
27 for the investment decisions nor or actions or omissions of  
28 the investment agent to which the investment functions are  
29 delegated.

1           ~~(5)~~(4) The investment agent shall, by virtue of  
2 acceptance of its appointment, be subject to the jurisdiction  
3 of the courts of this state.

4           (6)(5) In performing a delegated function, the  
5 investment agent shall be subject to the same standards as the  
6 fiduciary.

7           ~~(6)--This section applies to all existing and future~~  
8 ~~fiduciary relationships subject to this section, but only as~~  
9 ~~to acts or omissions occurring after October 17, 1993.~~

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

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

14           733.817 Apportionment of estate taxes.--

15           (1) For purposes of this section:

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

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

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

1           (d) "Included in the measure of the tax" means that  
2 for each separate tax that an interest may incur, only  
3 interests included in the measure of that particular tax are  
4 considered. The term "included in the measure of the tax" does  
5 not include any interest, whether passing under the will or  
6 not, to the extent the interest is initially deductible from  
7 the gross estate, without regard to any subsequent diminution  
8 of the deduction by reason of the charge of any part of the  
9 applicable tax to the interest. The term "included in the  
10 measure of the tax" does not include interests or amounts that  
11 are not included in the gross estate but are included in the  
12 amount upon which the applicable tax is computed, such as  
13 adjusted taxable gifts with respect to the federal estate tax.  
14 If an election is required for deductibility, an interest is  
15 not "initially deductible" unless the election for  
16 deductibility is allowed.

17           (e) "Internal Revenue Code" means the Internal Revenue  
18 Code of 1986, as amended from time to time.

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

26           (g) "Nonresiduary devise" means any devise that is not  
27 a residuary devise.

28           (h) "Nonresiduary interest" in connection with a trust  
29 means any interest in a trust which is not a residuary  
30 interest.  
31

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

10           (j) "Residuary devise" has the meaning set forth in s.  
11 731.201(30).

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

17           (l) "Revocable trust" means a trust as defined in s.  
18 731.201(33) created by the decedent to the extent that the  
19 decedent had at his or her death the power to alter, amend, or  
20 revoke the trust either alone or in conjunction with any other  
21 person.

22           (m) "State" means any state, territory, or possession  
23 of the United States, the District of Columbia, and the  
24 Commonwealth of Puerto Rico.

25           (n) "Tax" means any estate tax, inheritance tax,  
26 generation skipping transfer tax, or other tax levied or  
27 assessed under the laws of this or any other state, the United  
28 States, any other country, or any political subdivision of the  
29 foregoing, as finally determined, which is imposed as a result  
30 of the death of the decedent, including, without limitation,  
31 the tax assessed pursuant to s. 4980A of the Internal Revenue

1 Code. The term also includes any interest and penalties  
2 imposed in addition to the tax. Unless the context indicates  
3 otherwise, the term "tax" means each separate tax.

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

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

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

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

25 (3) The net tax attributable to the interests included  
26 in the measure of each tax shall be determined by the  
27 proportion that the value of each interest included in the  
28 measure of the tax bears to the total value of all interests  
29 included in the measure of the tax. Notwithstanding the  
30 foregoing:

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

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

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

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

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

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

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

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

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

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

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

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

29           1. The net tax attributable to nonresiduary devisees  
30 shall be charged to and paid from the residuary estate whether  
31 or not all interests in the residuary estate are included in

1 the measure of the tax. If the residuary estate is  
2 insufficient to pay the net tax attributable to all  
3 nonresiduary devisees, the balance of the net tax attributable  
4 to nonresiduary devisees shall be apportioned among the  
5 recipients of the nonresiduary devisees in the proportion that  
6 the value of each nonresiduary devise included in the measure  
7 of the tax bears to the total of all nonresiduary devisees  
8 included in the measure of the tax.

9       2. The net tax attributable to residuary devisees shall  
10 be apportioned among the recipients of the residuary devisees  
11 included in the measure of tax in the proportion that the  
12 value of each residuary devise included in the measure of the  
13 tax bears to the total of all residuary devisees included in  
14 the measure of the tax.

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

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

28       2. The net tax attributable to residuary interests  
29 shall be apportioned among the recipients of the residuary  
30 interests included in the measure of the tax in the proportion  
31 that the value of each residuary interest included in the

1 measure of the tax bears to the total of all residuary  
2 interests included in the measure of the tax.

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

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

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

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

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

27       (e) The net tax imposed under s. 4980A of the Internal  
28 Revenue Code shall be apportioned among the recipients of the  
29 interests included in the measure of that tax in the  
30 proportion that the value of the interest of each bears to the  
31

1 total value of all interests included in the measure of that  
2 tax.

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

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

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

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

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

1           4. For a direction in a governing instrument to be  
2 effective to direct payment of taxes attributable to property  
3 not passing under the governing instrument from property  
4 passing under the governing instrument, the governing  
5 instrument must expressly refer to this section, or expressly  
6 indicate that the property passing under the governing  
7 instrument is to bear the burden of taxation for property not  
8 passing under the governing instrument. A direction in the  
9 governing instrument to the effect that all taxes are to be  
10 paid from property passing under the governing instrument  
11 whether attributable to property passing under the governing  
12 instrument or otherwise shall be effective to direct the  
13 payment from property passing under the governing instrument  
14 of taxes attributable to property not passing under the  
15 governing instrument.

16           5. If there is a conflict as to payment of taxes  
17 between the decedent's will and the governing instrument, the  
18 decedent's will controls, except as follows:

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

22           b. A direction in a governing instrument to pay the  
23 tax attributable to assets that pass pursuant to the governing  
24 instrument from assets that pass pursuant to that governing  
25 instrument shall be effective notwithstanding any conflict  
26 with the decedent's will, unless the tax provision in the  
27 decedent's will expressly overrides the conflicting provision  
28 in the governing instrument.

29           (6) The personal representative or fiduciary shall not  
30 be required to transfer to a recipient any property in  
31 possession of the personal representative or fiduciary which

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

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

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

28 (8)(a) If the personal representative or fiduciary  
29 does not have possession of sufficient property otherwise  
30 distributable to the recipient to pay the tax apportioned to  
31 the recipient, whether under this section, the Internal

1 Revenue Code, or the governing instrument, if applicable, the  
2 personal representative or fiduciary shall recover the  
3 deficiency in tax so apportioned to the recipient:

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

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

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

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

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

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

29 1. That the estimated court costs and attorney's fees  
30 in collecting the apportioned tax from a person against whom  
31

1 the tax has been apportioned will approximate or exceed the  
2 amount of the recovery;

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

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

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

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

19 (11) Nothing in this section shall limit the right of  
20 any person who has paid more than the amount of the tax  
21 apportionable to such person, calculated as if all apportioned  
22 amounts would be collected, to obtain contribution from those  
23 who have not paid the full amount of the tax apportionable to  
24 them, calculated as if all apportioned amounts would be  
25 collected, and that right is hereby conferred. In any action  
26 to enforce contribution, the court shall award taxable costs  
27 as in chancery actions, including reasonable attorney's fees.

28 (12) Nothing herein contained shall be construed to  
29 require the personal representative or fiduciary to pay any  
30 tax levied or assessed by any foreign country, unless specific  
31 directions to that effect are contained in the will or other

1 instrument under which the personal representative or  
2 fiduciary is acting.

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

5 738.12 Underproductive property.--

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

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

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

28 (2) Upon the sale of the property the income  
29 beneficiary shall not be entitled to any portion of the  
30 proceeds of sale, except that any amount determined in  
31

1 subsection (1) that remains unpaid at the time of sale shall  
2 be paid therefrom.

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

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

10 744.441 Powers of guardian upon court approval.--After  
11 obtaining approval of the court pursuant to a petition for  
12 authorization to act, a plenary guardian of the property, or a  
13 limited guardian of the property within the powers granted by  
14 the order appointing the guardian or an approved annual or  
15 amended guardianship report, may:

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

19 Section 12. This act shall take effect upon becoming a  
20 law, except that section 9 of this act shall take effect  
21 October 1, 1998, and shall apply to the estates of decedents  
22 dying on or after October 1, 1998, and section 10 of this act  
23 shall take effect upon becoming law and shall be applicable to  
24 all trusts, whenever executed.

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1 STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN  
2 COMMITTEE SUBSTITUTE FOR  
3 SB's 818, 1136 & 1242

4 The committee substitute:

- 5 1. Amends s. 737.308, F.S., concerning the trustee's duty to  
6 file a notice of trust upon the death of the settlor, to  
7 require that the clerk send a copy of any caveat filed  
8 regarding the settlor to the trustee, and send the notice  
9 of trust to any caveator, unless there is a probate  
10 proceeding pending and the personal representative and  
11 the trustee are the same.
- 12 2. Amends. 737.303(4), F.S., to provide that the trustee is  
13 not required to provide the notice of the trustee's  
14 acceptance of the trust or the statement of accounts to  
15 any beneficiary who would be bound by an order binding on  
16 a representative of the beneficiary under s. 731.303, if  
17 such notice or statement is provided to that  
18 representative.
- 19 3. Amends s. 518.112, F.S., on delegation of investment  
20 functions to provide that a fiduciary may delegate any  
21 part or all of the investment functions to an investment  
22 agent if the fiduciary exercises reasonable care,  
23 judgment, and caution in selecting the investment agent,  
24 in establishing the scope and specific terms of any  
25 delegation, and in reviewing periodically the agent's  
26 actions in order to monitor overall performance and  
27 compliance with the scope and specific terms of the  
28 delegation; to provide that a fiduciary who administers  
29 an insurance contract on the lives of one or more persons  
30 may delegate specified investment functions, without any  
31 continuing obligation to review the agent's actions, to  
any one or more of a list of specific persons; and to  
provide specific court approval and written notice  
requirements for delegations of investment functions.
4. Amends ss. 733.707 and 744.441, F.S., to increase the  
amount which a personal representative and a guardian,  
respectively, may pay for funeral expenses from \$3,000 to  
\$6,000.

By the Committee on Judiciary and Senators Grant, Lee and  
Dudley

308-1834-97

A bill to be entitled

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. 733.08, F.S.; providing for specified notice to the trustee and caveator; amending s. 518.112, F.S.; providing for

1 delegation of investment functions; amending s.  
2 733.817, F.S.; revising provisions of law with  
3 respect to the apportionment of estate taxes;  
4 amending s. 738.12, F.S.; providing conditions  
5 under which a trust beneficiary is considered  
6 an income beneficiary; amending s. 744.441,  
7 F.S.; increasing the ceiling on funeral  
8 expenses; providing an effective date.  
9

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

11  
12 Section 1. Paragraph (e) is added to subsection (2) of  
13 section 689.225, Florida Statutes, to read:

14 689.225 Statutory rule against perpetuities.--

15 (2) STATEMENT OF THE RULE.--

16 (e) Language in a governing instrument is inoperative  
17 to the extent that it produces a period of time that exceeds  
18 21 years after the death of the survivor of the specified  
19 lives, if, in measuring a period from the creation of a trust  
20 or other property arrangement, that language seeks to disallow  
21 the vesting or termination of any interest or trust beyond,  
22 seeks to postpone the vesting or termination of any interest  
23 or trust until, or seeks to operate in effect in any similar  
24 fashion upon, the later of:

25 1. The expiration of a period of time not exceeding 21  
26 years after the death of a specified life or the survivor of  
27 specified lives, or upon the death of a specified life or the  
28 death of the survivor of specified lives in being at the  
29 creation of the trust or other property arrangement; or

30 2. The expiration of a period of time that exceeds or  
31 might exceed 21 years after the death of the survivor of lives

1 744.441(16), the personal representative, or any other person,  
2 not to exceed the aggregate of \$6,000 ~~\$3,000~~.

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

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

8 (e) Class 5.--Family allowance.

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

11 (g) Class 7.--Debts acquired after death by the  
12 continuation of the decedent's business, in accordance with s.  
13 733.612(22), but only to the extent of the assets of that  
14 business.

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

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

27 (a) For purposes of this subsection, any trusts  
28 established as part of, and all payments from, either an  
29 employee annuity described in s. 403 of the Internal Revenue  
30 Code of 1986, as amended, an Individual Retirement Account, as  
31 described in s. 408 of the Internal Revenue Code of 1986, as

1 in being at the creation of the trust or other property  
2 arrangement.

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

5 709.08 Durable power of attorney.--

6 (2) WHO MAY SERVE AS ATTORNEY IN FACT.--The attorney  
7 in fact must be a natural person who is 18 years of age or  
8 older and is of sound mind, or a financial institution, as  
9 defined in chapter 655, with trust powers, having a place of  
10 business in this state and authorized to conduct trust  
11 business in this state. A not-for-profit corporation,  
12 organized for charitable or religious purposes in this state,  
13 which has qualified as a court-appointed guardian prior to  
14 January 1, 1996, and which is a tax-exempt organization under  
15 26 U.S.C. s. 501(c)(3), may also act as an attorney in fact.  
16 Notwithstanding any contrary clause in the written power of  
17 attorney, no assets of the principal may be used for the  
18 benefit of the corporate attorney in fact, or its officers or  
19 directors.

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

22 733.707 Order of payment of expenses and  
23 obligations.--

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

27 (a) Class 1.--Costs, expenses of administration, and  
28 compensation of personal representatives and their attorneys'  
29 fees.

30 (b) Class 2.--Reasonable funeral, interment, and grave  
31 marker expenses, whether paid by a guardian under s.

1 amended, a Keogh (HR-10) Plan, or a retirement or other plan  
2 established by a corporation which is qualified under s. 401  
3 of the Internal Revenue Code of 1986, as amended, shall not be  
4 considered a trust over which the decedent has a right of  
5 revocation.

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

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

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

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

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

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

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

1 737.111 Execution requirements for express trusts.--

2 (1) The testamentary aspects of a trust defined in s.  
3 731.201(33), are invalid unless the trust instrument is  
4 executed by the settlor with the formalities required for the  
5 execution of a will.

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

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

15 (4) For the purposes of this section, the term  
16 "testamentary aspects" means those provisions of the trust  
17 that dispose of the trust property on or after the death of  
18 the settlor other than to the settlor's estate.

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

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

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

30 737.2041 Trustee's attorney's fees.--  
31

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

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

21           ~~(2)(3)~~ Unless otherwise agreed, compensation for  
22 ordinary services based upon the value of the trust assets  
23 immediately following the settlor's death and the income  
24 earned by the trust during initial administration at the rate  
25 of 75 percent of the schedule provided in s.  
26 733.6171(3)(a)-(h) is presumed to be reasonable total  
27 compensation for ordinary services of all attorneys employed  
28 generally to advise trustees concerning their duties in  
29 initial trust administration.

30           (3) An attorney who is retained to render only limited  
31 and specifically defined legal services shall be compensated

1 as provided in the retaining agreement. If the amount or  
2 method of determining compensation is not provided in the  
3 agreement, the attorney is entitled to a reasonable fee,  
4 taking into account the factors set forth in subsection (6).

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

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

11 (b) Implementation of substitution of the successor  
12 trustee.

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

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

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

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

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

25 (h) The trustee's obligation to inform and account to  
26 beneficiaries and the method of satisfaction of these  
27 obligations; the liability of the trust and trustee to the  
28 settlor's creditors; the advisability or necessity for probate  
29 proceedings to bar creditors; and the contribution  
30 requirements to the settlor's probate estate.  
31

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

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

7           (j)} Obtaining nontaxable certificate and receipt,  
8 if not done by a personal representative.

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

13           (l)} Distribution of income or principal to  
14 beneficiaries or funding of further trusts provided in the  
15 governing instrument.

16           (m)} Preparation of any legal documents required to  
17 effect distribution.

18           (n)} Fiduciary duties, avoidance of self-dealing,  
19 conflicts of interest, duty of impartiality, and obligations  
20 to beneficiaries.

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

27           (p)} Procedures for trustee's discharge from  
28 liability for administration of trust upon termination or  
29 resignation.

30           (5) ~~When a corporate fiduciary is serving as trustee~~  
31 ~~or cotrustee of a trust described in s. 733.707(3), the~~

1 ~~presumptive fee for ordinary services and the list of what~~  
2 ~~constitutes ordinary services in subsections (3) and (4) shall~~  
3 ~~not apply, and what constitutes ordinary services and~~  
4 ~~reasonable compensation for those services shall instead be~~  
5 ~~determined under the particular facts and circumstances~~  
6 ~~applicable to that trust.~~ In addition to the attorney's fees  
7 for ordinary services, the attorney for the trustee shall be  
8 allowed further reasonable compensation for any extraordinary  
9 service. What is an extraordinary service may vary depending  
10 on many factors, including the size of the trust.  
11 Extraordinary services may include, but are not limited to:  
12       (a) Involvement in a trust contest, trust  
13 construction, a proceeding for determination of beneficiaries,  
14 a contested claim, elective share proceedings, apportionment  
15 of estate taxes, or other adversary proceedings or litigation  
16 by or against the trust.  
17       (b) Representation of the trustee in audit or any  
18 proceeding for adjustment, determination, or collection of any  
19 taxes.  
20       (c) Tax advice on postmortem tax planning, including,  
21 but not limited to, disclaimer, renunciation of fiduciary  
22 commission, alternate valuation date, allocation of  
23 administrative expenses between tax returns, the QTIP or  
24 reverse QTIP election, allocation of GST exemption,  
25 qualification for Internal Revenue Code ss. 303 and 6166  
26 privileges, deduction of last illness expenses, distribution  
27 planning, asset basis considerations, throwback rules,  
28 handling income or deductions in respect of a decedent,  
29 valuation discounts, special use and other valuation, handling  
30 employee benefit or retirement proceeds, prompt assessment  
31

1 request, or request for release of personal liability for  
2 payment of tax.

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

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

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

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

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

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

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

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

30 (6) Upon petition of any interested person in a  
31 proceeding to review the compensation paid or to be paid to

1 the attorney for the trustee, the court may increase or  
2 decrease the compensation for ordinary services of the  
3 attorney for the trustee or award compensation for  
4 extraordinary services if the facts and circumstances of the  
5 particular administration warrant. In determining reasonable  
6 compensation, the court shall consider all of the following  
7 factors giving such weight to each as it may determine to be  
8 appropriate:

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

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

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

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

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

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

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

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

27 (i) Any other relevant factors.

28 (7) The court may determine reasonable attorney's  
29 compensation without receiving expert testimony. Any party  
30 may offer expert testimony after notice to interested persons.  
31 If expert testimony is offered, an expert witness fee may be

1 awarded by the court and paid from the assets of the trust.  
2 The court may, in its discretion, direct from what part of the  
3 trust it shall be paid.

4 (8) If a separate written agreement regarding  
5 compensation exists between the attorney and the settlor, the  
6 attorney shall furnish a copy to the trustee prior to  
7 commencement of employment and, if employed, shall promptly  
8 file and serve a copy on all interested persons. Neither a  
9 separate agreement nor a provision in the trust suggesting or  
10 directing the trustee to retain a specific attorney will  
11 obligate the trustee to employ the attorney or obligate the  
12 attorney to accept the representation, but if the attorney who  
13 is a party to the agreement or who drafted the trust is  
14 employed, the compensation paid shall not exceed the  
15 compensation provided in the agreement.

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

23 (10) "Initial trust administration" as used in this  
24 section means administration of a trust described in s.  
25 733.707(3) during the period which begins with the death of  
26 the settlor and ends upon the final distribution of trust  
27 assets outright or to continuing trusts created under the  
28 trust agreement, but if an estate tax return is required, not  
29 until after issuance of an estate tax closing letter or other  
30 evidence of termination of the estate tax proceeding. This

31

1 initial period is not intended to include continued regular  
2 administration of the trust.

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

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

7 737.303 Duty to inform and account to  
8 beneficiaries.--The trustee shall keep the beneficiaries of  
9 the trust reasonably informed of the trust and its  
10 administration. The trustee's duty to inform and account  
11 includes, but is not limited to, the following:

12 (4)

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

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

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

30 737.308 Notice of trust.--  
31

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

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

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

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

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

22 ~~(6)(5)~~ In any proceeding affecting the expenses of the  
23 administration of the estate, or any claims described in s.  
24 733.702(1), the trustee of a trust described in s. 733.707(3)  
25 is an interested person in the administration of the grantor's  
26 estate.

27 ~~(7)(6)~~ Any proceeding affecting the expenses of the  
28 administration of the estate or any claims described in s.  
29 733.702(1) prior to the trustee filing a notice of trust are  
30 binding upon the trustee.

31

1           ~~(8)(f7)~~ The trustee's failure to file the notice of  
2 trust does not affect the trustee's obligation to pay expenses  
3 of administration and enforceable claims as provided in s.  
4 733.607(2).

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

7           518.112 Delegation of investment functions.--

8           (1) A fiduciary may delegate any part or all of the  
9 investment functions, with regard to acts constituting  
10 investment functions that a prudent investor of comparable  
11 skills might delegate under the circumstances, and with regard  
12 to all or part of those investment functions, to an investment  
13 agent as provided in subsection ~~(3)(f2)~~, if the fiduciary  
14 exercises reasonable care, judgment, and caution in selecting  
15 the investment agent, in establishing the scope and specific  
16 terms of any delegation, and in reviewing periodically the  
17 agent's actions in order to monitor overall performance and  
18 compliance with the scope and specific terms of the  
19 delegation.

20           (2)(a) The requirements of subsection (1)  
21 notwithstanding, a fiduciary that administers an insurance  
22 contract on the life or lives of one or more persons may  
23 delegate without any continuing obligation to review the  
24 agent's actions, certain investment functions with respect to  
25 any such contract as provided in subsection (3), to any one or  
26 more of the following persons as investment agents:

27           1. The trust's settlor if the trust is one described  
28 in s. 733.707(3);

29           2. Beneficiaries of the trust or estate, regardless of  
30 the beneficiary's interest therein, whether vested or  
31 contingent;

1           3. The spouse, ancestor, or descendant of any person  
2 described in subparagraphs 1. or 2.;

3           4. Any person or entity nominated by a majority of the  
4 beneficiaries entitled to receive notice under subsection  
5 (3)(b); or

6           5. An investment agent if the fiduciary exercises  
7 reasonable care, judgment, and caution in selecting the  
8 investment agent and in establishing the scope and specific  
9 terms of any delegation.

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

12           1. A determination of whether any insurance contract  
13 is or remains a proper investment;

14           2. A determination of whether or not to exercise any  
15 policy option available under such contracts;

16           3. A determination of whether or not to diversify such  
17 contracts relative to one another or to other assets, if any,  
18 administered by the fiduciary; or

19           4. An inquiry about changes in the health or financial  
20 condition of the insured or insureds relative to any such  
21 contract.

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

27           (3)(2) A fiduciary may delegate investment functions  
28 to an investment agent under subsections (1) or (2) pursuant  
29 to-subsection-(+), if:

30           ~~(a) The fiduciary exercises reasonable care, judgment,~~  
31 ~~and caution in selecting the investment agent, in establishing~~

~~1 the scope and specific terms of any delegation, and in~~  
~~2 reviewing periodically the agent's actions in order to monitor~~  
~~3 overall performance and compliance with the scope and specific~~  
~~4 terms of the delegation.~~

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

7       (b)(c) In the case of a trust or estate, the fiduciary  
8 has given written notice, of its intention to begin delegating  
9 investment functions under this section, to all the  
10 beneficiaries, or their legal representative, eligible to  
11 ~~receive income from the trust or~~ distributions from the trust  
12 or estate within 30 days of the delegation unless such notice  
13 is waived by the eligible beneficiaries entitled to receive  
14 such notice. This notice shall thereafter, until or unless  
15 the beneficiaries eligible to receive income from the trust or  
16 distributions from the estate at the time are notified to the  
17 contrary, authorize the trustee or legal representative to  
18 delegate investment functions pursuant to this subsection.  
19 This discretion to revoke the delegation does not imply under  
20 subsection (2) any continuing obligation to review the agent's  
21 actions.

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

27       2. Additionally, as used herein, legal representative  
28 includes one described in s. 731.303, without any requirement  
29 of a court order, an attorney-in-fact under a durable power of  
30 attorney sufficient to grant such authority, a legally  
31 appointed guardian, or equivalent under applicable law, any

1 living, natural guardian of a minor child, or a guardian ad  
2 litem. In the case of a minor, notice may be sent to a parent  
3 or legal guardian of the minor:

4 3. Written notice shall be:

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

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

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

13  
14 Notice by mail or by approved commercial delivery service is  
15 complete on receipt of notice. Proof of notice must be by  
16 verified statement of the person mailing or sending notice,  
17 and there must be attached thereto the signed receipt or other  
18 satisfactory evidence that delivery was effected on the  
19 addressee or on the addressee's agent. Proof of notice must be  
20 maintained among the trustee's permanent records. In the case  
21 of an otherwise incapacitated person, notice may be given to  
22 the guardian of such person or to such person's donee under a  
23 durable power of attorney that is sufficient to grant such  
24 authority:

25 (4)(3) If all requirements of subsection (3)(2) are  
26 satisfied, the fiduciary shall not be responsible otherwise  
27 for the investment decisions nor or actions or omissions of  
28 the investment agent to which the investment functions are  
29 delegated.

1           ~~(5)(4)~~ The investment agent shall, by virtue of  
2 acceptance of its appointment, be subject to the jurisdiction  
3 of the courts of this state.

4           ~~(6)(5)~~ In performing a delegated function, the  
5 investment agent shall be subject to the same standards as the  
6 fiduciary.

7           ~~(6)--This section applies to all existing and future~~  
8 ~~fiduciary relationships subject to this section, but only as~~  
9 ~~to acts or omissions occurring after October 17, 1993.~~

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

12           (Substantial rewording of section. See

13           s. 733.817, F.S., for present text.)

14           733.817 Apportionment of estate taxes.--

15           (1) For purposes of this section:

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

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

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

1           (d) "Included in the measure of the tax" means that  
2 for each separate tax that an interest may incur, only  
3 interests included in the measure of that particular tax are  
4 considered. The term "included in the measure of the tax" does  
5 not include any interest, whether passing under the will or  
6 not, to the extent the interest is initially deductible from  
7 the gross estate, without regard to any subsequent diminution  
8 of the deduction by reason of the charge of any part of the  
9 applicable tax to the interest. The term "included in the  
10 measure of the tax" does not include interests or amounts that  
11 are not included in the gross estate but are included in the  
12 amount upon which the applicable tax is computed, such as  
13 adjusted taxable gifts with respect to the federal estate tax.  
14 If an election is required for deductibility, an interest is  
15 not "initially deductible" unless the election for  
16 deductibility is allowed.

17           (e) "Internal Revenue Code" means the Internal Revenue  
18 Code of 1986, as amended from time to time.

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

26           (g) "Nonresiduary devise" means any devise that is not  
27 a residuary devise.

28           (h) "Nonresiduary interest" in connection with a trust  
29 means any interest in a trust which is not a residuary  
30 interest.

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

10           (j) "Residuary devise" has the meaning set forth in s.  
11 731.201(30).

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

17           (l) "Revocable trust" means a trust as defined in s.  
18 731.201(33) created by the decedent to the extent that the  
19 decedent had at his or her death the power to alter, amend, or  
20 revoke the trust either alone or in conjunction with any other  
21 person.

22           (m) "State" means any state, territory, or possession  
23 of the United States, the District of Columbia, and the  
24 Commonwealth of Puerto Rico.

25           (n) "Tax" means any estate tax, inheritance tax,  
26 generation skipping transfer tax, or other tax levied or  
27 assessed under the laws of this or any other state, the United  
28 States, any other country, or any political subdivision of the  
29 foregoing, as finally determined, which is imposed as a result  
30 of the death of the decedent, including, without limitation,  
31 the tax assessed pursuant to s. 4980A of the Internal Revenue

1 Code. The term also includes any interest and penalties  
2 imposed in addition to the tax. Unless the context indicates  
3 otherwise, the term "tax" means each separate tax.

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

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

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

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

25 (3) The net tax attributable to the interests included  
26 in the measure of each tax shall be determined by the  
27 proportion that the value of each interest included in the  
28 measure of the tax bears to the total value of all interests  
29 included in the measure of the tax. Notwithstanding the  
30 foregoing:

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

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

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

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

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

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

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

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

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

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

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

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

29           1. The net tax attributable to nonresiduary devisees  
30 shall be charged to and paid from the residuary estate whether  
31 or not all interests in the residuary estate are included in

1 the measure of the tax. If the residuary estate is  
2 insufficient to pay the net tax attributable to all  
3 nonresiduary devisees, the balance of the net tax attributable  
4 to nonresiduary devisees shall be apportioned among the  
5 recipients of the nonresiduary devisees in the proportion that  
6 the value of each nonresiduary devise included in the measure  
7 of the tax bears to the total of all nonresiduary devisees  
8 included in the measure of the tax.

9       2. The net tax attributable to residuary devisees shall  
10 be apportioned among the recipients of the residuary devisees  
11 included in the measure of tax in the proportion that the  
12 value of each residuary devise included in the measure of the  
13 tax bears to the total of all residuary devisees included in  
14 the measure of the tax.

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

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

28       2. The net tax attributable to residuary interests  
29 shall be apportioned among the recipients of the residuary  
30 interests included in the measure of the tax in the proportion  
31 that the value of each residuary interest included in the

1 measure of the tax bears to the total of all residuary  
2 interests included in the measure of the tax.

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

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

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

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

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

27 (e) The net tax imposed under s. 4980A of the Internal  
28 Revenue Code shall be apportioned among the recipients of the  
29 interests included in the measure of that tax in the  
30 proportion that the value of the interest of each bears to the  
31

1 total value of all interests included in the measure of that  
2 tax.

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

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

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

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

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

1           4. For a direction in a governing instrument to be  
2 effective to direct payment of taxes attributable to property  
3 not passing under the governing instrument from property  
4 passing under the governing instrument, the governing  
5 instrument must expressly refer to this section, or expressly  
6 indicate that the property passing under the governing  
7 instrument is to bear the burden of taxation for property not  
8 passing under the governing instrument. A direction in the  
9 governing instrument to the effect that all taxes are to be  
10 paid from property passing under the governing instrument  
11 whether attributable to property passing under the governing  
12 instrument or otherwise shall be effective to direct the  
13 payment from property passing under the governing instrument  
14 of taxes attributable to property not passing under the  
15 governing instrument.

16           5. If there is a conflict as to payment of taxes  
17 between the decedent's will and the governing instrument, the  
18 decedent's will controls, except as follows:

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

22           b. A direction in a governing instrument to pay the  
23 tax attributable to assets that pass pursuant to the governing  
24 instrument from assets that pass pursuant to that governing  
25 instrument shall be effective notwithstanding any conflict  
26 with the decedent's will, unless the tax provision in the  
27 decedent's will expressly overrides the conflicting provision  
28 in the governing instrument.

29           (6) The personal representative or fiduciary shall not  
30 be required to transfer to a recipient any property in  
31 possession of the personal representative or fiduciary which

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

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

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

28 (8)(a) If the personal representative or fiduciary  
29 does not have possession of sufficient property otherwise  
30 distributable to the recipient to pay the tax apportioned to  
31 the recipient, whether under this section, the Internal

1 Revenue Code, or the governing instrument, if applicable, the  
2 personal representative or fiduciary shall recover the  
3 deficiency in tax so apportioned to the recipient:

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

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

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

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

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

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

29       1. That the estimated court costs and attorney's fees  
30 in collecting the apportioned tax from a person against whom  
31

1 the tax has been apportioned will approximate or exceed the  
2 amount of the recovery;

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

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

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

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

19 (11) Nothing in this section shall limit the right of  
20 any person who has paid more than the amount of the tax  
21 apportionable to such person, calculated as if all apportioned  
22 amounts would be collected, to obtain contribution from those  
23 who have not paid the full amount of the tax apportionable to  
24 them, calculated as if all apportioned amounts would be  
25 collected, and that right is hereby conferred. In any action  
26 to enforce contribution, the court shall award taxable costs  
27 as in chancery actions, including reasonable attorney's fees.

28 (12) Nothing herein contained shall be construed to  
29 require the personal representative or fiduciary to pay any  
30 tax levied or assessed by any foreign country, unless specific  
31 directions to that effect are contained in the will or other

1 instrument under which the personal representative or  
2 fiduciary is acting.

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

5 738.12 Underproductive property.--

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

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

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

28 (2) Upon the sale of the property the income  
29 beneficiary shall not be entitled to any portion of the  
30 proceeds of sale, except that any amount determined in  
31

1 subsection (1) that remains unpaid at the time of sale shall  
2 be paid therefrom.

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

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

10 744.441 Powers of guardian upon court approval.--After  
11 obtaining approval of the court pursuant to a petition for  
12 authorization to act, a plenary guardian of the property, or a  
13 limited guardian of the property within the powers granted by  
14 the order appointing the guardian or an approved annual or  
15 amended guardianship report, may:

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

19 Section 12. This act shall take effect upon becoming a  
20 law, except that section 9 of this act shall take effect  
21 October 1, 1998, and shall apply to the estates of decedents  
22 dying on or after October 1, 1998, and section 10 of this act  
23 shall take effect upon becoming law and shall be applicable to  
24 all trusts, whenever executed.

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1 STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN  
2 COMMITTEE SUBSTITUTE FOR  
3 SB's 818, 1136 & 1242

4 The committee substitute:

- 5 1. Amends s. 737.308, F.S., concerning the trustee's duty to  
6 file a notice of trust upon the death of the settlor, to  
7 require that the clerk send a copy of any caveat filed  
8 regarding the settlor to the trustee, and send the notice  
of trust to any caveator, unless there is a probate  
proceeding pending and the personal representative and  
the trustee are the same.
- 9 2. Amends. 737.303(4), F.S., to provide that the trustee is  
not required to provide the notice of the trustee's  
10 acceptance of the trust or the statement of accounts to  
any beneficiary who would be bound by an order binding on  
11 a representative of the beneficiary under s. 731.303, if  
such notice or statement is provided to that  
12 representative.
- 13 3. Amends s. 518.112, F.S., on delegation of investment  
14 functions to provide that a fiduciary may delegate any  
part or all of the investment functions to an investment  
15 agent if the fiduciary exercises reasonable care,  
judgment, and caution in selecting the investment agent,  
16 in establishing the scope and specific terms of any  
delegation, and in reviewing periodically the agent's  
17 actions in order to monitor overall performance and  
compliance with the scope and specific terms of the  
18 delegation; to provide that a fiduciary who administers  
an insurance contract on the lives of one or more persons  
19 may delegate specified investment functions, without any  
continuing obligation to review the agent's actions, to  
20 any one or more of a list of specific persons; and to  
provide specific court approval and written notice  
21 requirements for delegations of investment functions.
- 22 4. Amends ss. 733.707 and 744.441, F.S., to increase the  
amount which a personal representative and a guardian,  
23 respectively, may pay for funeral expenses from \$3,000 to  
\$6,000.
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**SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT**

(This document is based only on the provisions contained in the legislation as of the latest date listed below )

Date: April 3, 1997 Revised: \_\_\_\_\_

Subject Trusts & Estates/Administration

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1	<u>Wiehle</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable/CS</u>
2	_____	_____	_____	_____
3	_____	_____	_____	_____
4	_____	_____	_____	_____
5	_____	_____	_____	_____

**I. Summary:**

The bill provides a definition of "right of revocation" for purposes of determining whether the assets of a trust are liable for the expenses of administration of the decedent's estate and enforceable claims of the decedent's creditors. The bill provides that s 737 111, F.S., does not apply to specified types of annuities or retirement plans and that the section does not apply to trust instruments executed prior to October 1, 1995. It also provides that the trustee of a trust with a right of revocation need not report to the beneficiaries during the grantor's lifetime. Finally, it increases the amount which a personal representative or a guardian may pay for funeral expenses from \$3,000 to \$6,000.

The bill also provides that a not-for-profit corporation may act as an attorney in fact; provides for the compensation of an attorney for a trustee, provides a new element of the rule against perpetuities, revises the statute on underproductive trust property, and provides for apportionment of estate taxes.

This bill substantially amends the following sections of the Florida Statutes 689 225, 709 08, 733 707, 737 111, 737.2041, 737 303, 737 308, 518.112, 733 817, 738 12, and 744 441.

**II. Present Situation:**

**Rule Against Perpetuities**

Section 689 225, F S, is the "Florida Uniform Statutory Rule Against Perpetuities." Subsection (2) provides a statement of the rule.

- A nonvested property interest in real or personal property is invalid unless: when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or the interest either vests or terminates within 90 years after its creation.
- A general power of appointment not presently exercisable because of a condition precedent is invalid unless: when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation
- A nongeneral power of appointment or a general testamentary power of appointment is invalid unless when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or the power is irrevocably exercised or otherwise terminates within 90 years after its creation.
- In determining whether a nonvested property interest or a power of appointment is valid, the possibility that a child will be born to an individual after the individual's death is disregarded.

### **Probate**

Section 733.707, F.S., provides for the personal representative's payment of the expenses of the administration and obligations of the estate. Section 733.707(3), F.S., provides that 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 (c)*, 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. Paragraph (c) contains no definitions

Section 733.707(3)(a), F.S., provides that, for purposes of subsection (3), 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, are not to be considered a trust over which the decedent has a right of revocation

Section 737.111, F.S., was enacted in 1995 and took effect October 1, 1995 Ch 95-401, s. 11, at 3287, Laws of Fla. The section provides that the testamentary aspects of a trust are invalid unless the trust is executed with the formalities required for the execution of a will. Also, the testamentary aspects of an amendment to a trust are invalid unless the amendment is executed with the same formalities as a will. For the purposes of this section, the term "testamentary

aspects” means those provisions of the trust that dispose of the trust property on the death of the settlor other than to the settlor’s estate

Section 737.303, F.S., sets out the duty of a trustee to inform and account to beneficiaries. The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. A beneficiary is entitled to a statement of the accounts of the trust annually and upon termination of the trust or upon change of the trustee except that, in the case of a trust described in s. 733.707(3), F.S., the trustee's duties extend only to the grantor or beneficiary or the legal representative of the grantor or beneficiary during the grantor's lifetime. Section 737.303(4)(e), F.S., provides that all rights which the section provides to a beneficiary may be asserted by a legal representative or natural guardian of the beneficiary. Notice of the trustee’s acceptance of the trust and the statement of accounts provided to a representative of the beneficiary binds the beneficiary.

Section 737.308, F.S., requires that, 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. The clerk must 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. The clerk is required to notify the trustee of any probate proceeding and to notify the personal representative of the notice of trust.

### **Reasonable Funeral Expenses**

Section 733.707(1)(b), F.S., provides that a personal representative is to pay reasonable funeral, interment, and grave marker expenses not to exceed \$3,000.

Similarly, section 744.441(6), F.S., provides that a guardian may pay reasonable funeral, interment, and grave marker expenses for the ward from the ward’s estate up to a maximum of \$3,000.

### **Durable Power of Attorney**

Prior to October 1, 1995, the durable power of attorney statute did not prescribe or limit who could serve as an attorney in fact. As amended in 1995, the statute limits who can serve to either 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. Ch. 95-401, s. 17, at 3292, Laws of Fla.

### **Trustee’s Attorney’s Fees**

Section 737.2041, F.S., provides that the attorney retained by the trustee of a trust described in s. 733.707(3), F.S., is entitled to reasonable compensation for legal services rendered in the initial administration of the trust payable from the assets of the trust without court order. 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

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), F.S , is presumed to be reasonable compensation for attorneys in initial trust administration The section provides that ordinary services of the attorney for a trustee include legal advice and representation relating to a list of possible duties of the trustee.

When a corporate fiduciary is serving as trustee or cotrustee, the presumptive fee for ordinary services and the list of what constitutes ordinary services does not apply, and what constitutes ordinary services and reasonable compensation for those services is instead 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 is 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 The statute sets forth a list of some services which constitute extraordinary services.

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 is to consider all of a list of factors set forth in the section, giving such weight to each as it may determine to be appropriate

### **Delegation of Investment Functions**

Section 518 112, F S , provides for fiduciary delegation of investment functions A fiduciary may delegate 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 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
- In the case of a guardianship, the fiduciary has obtained court approval
- 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 the beneficiaries eligible to receive income from the trust or distributions from the 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 to delegate investment functions pursuant to this subsection

- Notice to beneficiaries eligible to receive income from the trust or distributions from the estate, at the time of delegation, shall be sufficient notice to all persons who may join the eligible class of beneficiaries in the future.
- In the case of a minor, notice may be sent to a parent or legal guardian of the minor
- 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.

If all the foregoing requirements are satisfied, the fiduciary shall not be responsible otherwise for the investment decisions or actions of the investment agent to which the investment functions are delegated. In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary. The investment agent shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state

The section applies to all existing and future fiduciary relationships subject to the section, but only as to acts or omissions occurring after October 1, 1993.

### **Apportionment of Estate Tax**

Section 733 817, F S., provides for apportionment of estate taxes. Any estate or other death tax shall be apportioned in the following manner:

If a part of the estate passed under a will by reference to a specific property or in any other nonresiduary form, exclusive of property over which the decedent had a power of appointment as defined from time to time under the estate tax laws of the United States, the net amount of the tax attributable to it shall be charged to and paid from the residuary estate without requiring contribution from persons receiving the interests, except as otherwise directed by the governing instrument. In the event the residuary estate is insufficient to pay the tax attributable to the interests, any balance of the tax shall be equitably apportioned among the recipients of the interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interests so included, except as otherwise directed by the governing instrument.

If a part of the estate passed under the will as a residuary interest, exclusive of property over which the decedent had power of appointment, the net amount of tax attributable to it shall be equitably apportioned among the residuary beneficiaries in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests so included, except as otherwise directed by the governing instrument. When a residuary interest is a temporary interest, the tax attributable to it shall be charged to corpus and not apportioned between temporary and remainder interests.

If a part of the property concerning which the tax is levied or assessed is held under the terms of any trust created inter vivos, then, unless the governing instrument directs otherwise

- If any portion of the trust is directed to pass or to be held in further trust by reference to a specific property, or type of property, fund, sum, or statutory amount, or in any other nonresiduary form, the net amount of the tax attributable to that portion must be charged to and paid from the corpus of the residuary share of the trust without requiring contribution from the nonresiduary interest or the persons receiving or benefiting from that interest. If the residuary portion of the trust is insufficient to pay the tax attributable to all nonresiduary interests, any balance of the tax must be equitably apportioned among the recipients of those interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interest so included.
- The net amount of the tax directly attributable to the residuary share of the trust, if any, must be charged as follows: the net amount of the tax attributable to each residuary temporary interest must be charged to that portion of residuary principal that supports the temporary interest without apportionment, and the net amount of the tax attributable to the balance of the residuary share must be equitably apportioned among the residuary beneficiaries, by charge to the corpus of their interest in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests included.

Real property or mobile home homesteads that are exempt from execution by law shall be exempt from apportionment of taxes. Persons taking an interest in the homesteads shall not be liable for apportionment of taxes on account of the homesteads. The net amount of the tax attributable to homestead property shall be paid from other assets of any trust or the estate subject to administration in the order as directed by the governing instrument or, absent this direction, in the following order:

- Property not disposed of by the will or trust.
- Property passing as the residuary estate
- Property not specifically or demonstratively devised
- Property specifically or demonstratively devised

The balance of the net amount of the tax shall be equitably apportioned among, and paid by, the recipients and beneficiaries of the properties or interests, in the proportion that the value of the property or interest of each included in the measure of the tax bears to the total value of all the properties and interests included in the measure of the tax, except as otherwise directed by the governing instrument. With respect to a temporary interest not in trust, the amount charged to the recipients or beneficiaries shall not be apportioned between temporary and remainder interests but shall be charged to and paid out of the corpus of the property or fund, except as otherwise directed by the governing instrument.

Nothing herein contained shall be construed to require the personal representative or other concerned fiduciary to pay any estate, inheritance, or other death taxes levied or assessed by any foreign country, unless specific directions to that effect are contained in the will or other instrument under which the fiduciary is acting

A direction against apportionment under this section may be explicit or implicit from the terms of the governing instrument, but must be clear and unequivocal, provided, however, that an implicit direction against apportionment is not sufficient to avoid the apportionment under state or applicable federal law unless the court also finds that the testator considered and made a deliberate and informed decision about the burden of taxation

No personal representative or other fiduciary shall be required to transfer any property until the amount of any tax due from the transferee is paid or, if the apportionment of tax has not been determined, until adequate security is furnished for the payment. The fiduciary shall not be required to distribute assets that he reasonably anticipates may be necessary to pay any state or federal taxes

After the amount of all estate, inheritance, and death taxes is finally determined, the personal representative or other fiduciary shall petition for an order of apportionment and shall give formal notice of the petition and the hearing to all interested persons

### **Underproductive Property**

Section 738.12, F.S., provides for underproductive trust property. 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 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year. This amount shall be paid to the income beneficiary using the first principal cash available

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. Upon the sale of the property the income beneficiary shall not be entitled to any portion of the proceeds of sale, except any amount previously owing and unpaid from the 3 percent of principal computation above sale shall be paid therefrom

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 the 3 percent of principal computation above shall be retained or disposed of as provided by the terms of the trust

### III. Effect of Proposed Changes:

#### Rule Against Perpetuities

The bill adds to s. 689 225(2) an additional element of the rule against perpetuities, that being that language in a governing instrument is inoperative to the extent that it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives, if, in measuring a period from the creation of a trust or other property arrangement, that language seeks to disallow the vesting or termination of any interest or trust beyond, seeks to postpone the vesting or termination of any interest or trust until, or seeks to operate in effect in any similar fashion upon, the later of:

- 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
- 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

#### Probate

The bill amends s. 733 707, F.S., by inserting the missing definition of the term "right of revocation." The term is defined as a power retained by the decedent, held in any capacity, to amend or revoke the trust and re-vest the principal of the trust in the decedent, or withdraw or appoint the principal of the trust to or for the decedent's benefit.

The bill amends s. 737 308, F.S., concerning the trustee's duty to file a notice of trust upon the death of the settlor to require that the clerk send a copy of any caveat filed regarding the settlor to the trustee, and send the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same.

The bill amends s. 737.111, F.S., to provide that it does not apply to trusts established as part of an employee annuity, an Individual Retirement Account, a Keogh Plan, or a retirement plan. The bill also establishes that the section does not apply to trust instruments executed prior to October 1, 1995.

The bill amends s. 737 303(4)(c), F.S., by deleting the term beneficiary, thereby requiring that the trustee give the annual report and other specified reports only to the grantor during the grantor's lifetime. The bill further amends this section to provide that the trustee is not required to provide the notice of the trustee's acceptance of the trust or the 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 is provided to that representative.

### **Reasonable Funeral Expenses**

The bill amends ss 733.707(1)(b) and 744.441(6), F.S , to increase the amount which a personal representative or a guardian may pay for reasonable funeral, interment, an grave marker expenses from \$3,000 to \$6,000

### **Durable Power of Attorney**

The bill amends s 709 08, F S , to provide that a not-for-profit charitable corporation may act as an attorney in fact if the assets of the principal are not used in any way for the benefit of the corporation.

### **Trustee's Attorney's Fees**

The bill amends s 737 2041, F S , to provide that a trustee and an attorney may agree to compensation different from that provided in the section The agreement is not binding upon a person who bears the impact of the compensation unless that person is a party to the agreement "or otherwise consents to be bound by the agreement." Compensation based upon the value of the trust assets and the income earned during initial administration is presumed to be reasonable *total* compensation for *all* attorneys employed to advise the trustee during initial trust administration If a trustee retains an attorney for limited, specific legal services, compensation is to be as provided in the agreement If the agreement does not specify compensation, it is to be determined by the factors set out in the subsection providing for court determination of reasonable attorney compensation Finally, the bill deletes references to corporate fiduciaries, thus subjecting corporate fiduciary trustees to the same provisions as other trustees

### **Delegation of Investment Functions**

The bill amends s 518 112, F S , to provide that 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 pursuant to the provisions below 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

These requirements notwithstanding, a fiduciary who administers an insurance contract on the lives of one or more persons may delegate specified investment functions, without any continuing obligation to review the agent's actions, to any one or more of a list of specific persons Additionally, until the contract matures and the policy proceeds are received, a fiduciary that administers insurance contracts under these provisions is not obligated to diversify nor allocate other assets, if any, relative to such insurance contracts

A fiduciary may delegate investment functions to an investment agent as above if

- In the case of a guardianship, the fiduciary has obtained court approval.
- 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 beneficiaries eligible to receive 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. The discretion to revoke the delegation does not imply any continuing obligation on the part of a fiduciary administering life insurance contracts to review the agent's actions
  - Notice to beneficiaries eligible to receive distributions from the trust or the estate, or to their legal representatives, shall be sufficient notice to all persons who may join the eligible class of beneficiaries in the future
  - As used herein, "legal representative" includes one described in s 737 303, 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
  - Written notice must be 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's principal place of business is located and which requires a signed receipt, as provided by law for service of process, or by an elisor as may be provided in the Florida Rules of Civil Procedure

If all the foregoing requirements are satisfied, the fiduciary shall not be responsible otherwise for the investment decisions nor actions or omissions of the investment agent to which the investment functions are delegated. In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary. The investment agent shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state.

### **Apportionment of Estate Tax**

The bill amends s 733 817, F S., to provide that 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 tax measure. However:

- The net tax attributable to interests included by reason of s 2044 of the Internal Revenue Code (IRC) shall be determined as provided in the IRC and the amount so determined shall be deducted from the tax to determine the net tax attributable to all remaining interests.

- The foreign tax credit 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
- The reduction in the Florida tax on the estate of a Florida resident for tax paid to other states shall be allocated as follows
  - If the tax paid on a property to another state is greater than or equal to the tentative Florida tax attributable to the property, none of the Florida tax is attributable to the property
  - If the tax paid on a property to another state is less than the tentative Florida tax attributable to the property, the Florida tax attributable to the property is the excess of the tentative Florida tax over the tax payable to the other state
  - Any remaining Florida tax shall be attributable to property included exclusive of property taxable in other states
- The tax attributable to a temporary interest is regarded as attributable to the principal that supports the temporary interest

Except as provided above or as otherwise directed in the governing documents, the net tax attributable to each interest shall be apportioned as follows

- For property passing under the decedent's will
  - The net tax attributable to nonresiduary devisees shall be charged to and paid from the residuary estate. If the residuary estate is insufficient to pay the net tax attributable to all nonresiduary devisees, the balance of the tax shall be apportioned among the recipients of the nonresiduary devisees
  - The net tax attributable to residuary devisees shall be apportioned among the recipients of residuary devisees
- For property passing under the terms of a trust other than a trust created by the decedent's will
  - The net tax attributable to nonresiduary interests shall be charged to and paid from the residuary portion of the trust. If the residuary portion is insufficient to pay the net tax attributable to all nonresiduary interests, the balance of the tax shall be apportioned among the recipients of the nonresiduary interests

- The net tax attributable to residuary interests shall be apportioned among the recipients of the residuary interests
- The net tax attributable to an interest in homestead property shall be apportioned against the recipients of other interests in the estate or passing under any revocable trust
- This apportionment is to be made as if all recipients were taking under a common instrument.
- If a court finds it inequitable to apportion the tax as directed by the statutes, it may assess liability for the payment of taxes in the manner it finds equitable
- To be effective as a direction for payment of tax in a manner different from that provided, the governing instrument must direct that the tax be paid from assets which pass pursuant to the governing instrument

A personal representative or fiduciary is not to be required to transfer to a recipient any property which he or she reasonably anticipates may be necessary for payment of taxes nor to transfer any property until the amount of taxes due from the recipient is paid by the recipient.

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.

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, the personal representative or fiduciary is to recover the deficiency from the fiduciary in possession of the property to which the tax is apportioned or from the recipient.

A personal representative or fiduciary who has the duty of collecting the apportioned tax may be relieved of this duty by order of the court.

Any apportioned tax that is not collected shall be reapportioned as if the portion of the property to which the uncollected tax had been apportioned was exempt.

### **Underproductive Property**

The bill amends s 738.12, F.S., on underproductive trust property. Under the bill, 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, instead of the trustee paying the income beneficiary an amount equal to 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year, the trustee would pay 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.

The bill adds that, for purposes of the 3 percent calculation, 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.

The bill deletes the existing language on retention of a portion of the income by the trustee.

#### **Effective Date**

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions.**

None

##### **B. Public Records/Open Meetings Issues:**

None

##### **C. Trust Funds Restrictions:**

None

##### **D. Other Constitutional Issues:**

The bill specifically provides that the amendments to the underproductive trust property statute are to be applicable to all trusts, whenever executed. Under the case law discussed in below in Section VII, any such application which impaired pre-existing contracts would be subject to constitutional challenge.

Under the case law discussed in below in Section VII, the new element of the rule against perpetuities would apply prospectively only. Additionally, any attempt to apply this provision to invalidate existing instruments would be subject to challenge as an unconstitutional impairment of pre-existing contracts.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None

**VII. Related Issues:**

It is well established that in the absence of clear legislative expression to the contrary, legislation is presumed to operate prospectively *e.g.*, *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239, 241 (Fla. 1977), *Fleeman V. Case*, 342 So 2d 815, 817 (Fla. 1977), and *Dewberry v. Auto-Owners Insurance Company*, 363 So 2d 1077, 1079 (Fla 1978) Additionally, Article I, Section 10 of both the United States and Florida Constitutions prohibit the retroactive application of a statute when such application would impair the obligations of contract. *See Fleeman, Dewberry, and Castellano v Cosgrove*, 280 So 2d 676 (Fla 1973).

The *Castellano* case is a good example of the application of this law to an attempted retroactive application of a statute. In January 1968, Nicholas Castellano executed a savings account discretionary revocable trust agreement with a savings and loan association, which issued a certificate of savings in the name of "Nicholas Castellano as trustee for Angela Castellano" *Castellano*, at 677 On July 1, 1969, a statute became effective which provided that when the settlor of a trust is the sole trustee, the trust instrument must be executed with the formalities for the execution of a will *Id* The legislation enacting the statute provided that it was to apply to trusts executed before, on, or after the effective date of the legislation *Id* Nicholas Castellano died intestate in September 1969, survived by his daughter, Angela Castellano, and his widow, the appellant *Id* Appellant contested the trust based on the new statute as the trust documents had not been executed in the presence of two verifying witnesses *Id* The trial court held the statute unconstitutional as applied to the preexisting trust as the trust agreement was a contract in being which could not be impaired under either the Florida or the Federal Constitution. *Id*. The Florida Supreme Court agreed and affirmed *Id*

Staff has received reports that some lawyers have contacted their clients who have trusts with testamentary aspects and informed them that s. 737 111 requires that they execute a new trust, for a fee

**VIII. Amendments:**

None

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate

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SENATE SUMMARY

Provides that certain not-for-profit corporations may act as an attorney in fact. Provides that no assets of the principal may be used for the benefit of the corporate attorney in fact, or its officers or directors

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A bill to be entitled  
An act relating to a durable power of attorney;  
amending s. 709.08, F.S.; authorizing certain  
corporations to act as an attorney in fact;  
providing a limitation; providing an effective  
date.

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

Section 1. 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 2 This act shall take effect July 1, 1997.