

## Florida Legislative Update – Probate And Trust Changes [Florida]

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Our last Florida update relates to changes to Florida's probate and trust code. The following summary has been written by Sean Leibowitz of our office.

On April 14, 2011 and April 29, 2011, the Florida legislature enacted several significant changes to the probate and trust code (hereinafter referred to as "legislation"). The bill was signed by the Governor on June 21, 2011. Some of the key sections of the legislation became effective on July 1, 2011 and others will become effective on October 1, 2011. In essence, the legislation creates or substantially modifies the following subject matters: I) Intestate succession; II) Reformation of a will; III) Challenges to revocation of a will and trust; IV) Attorney-client privilege relating to fiduciaries; and V) Timing for requesting attorney's fees in a trust matter. The author urges probate and trust litigators to review the entire legislation because it contains nuances not fully addressed in this article.

### **I. Intestate Succession**

When a decedent dies without a will, the assets are distributed according to the laws of intestacy. Currently, the intestate share of a surviving spouse where all of the decedent's descendants are also descendants of the surviving spouse is the first \$60,000.00 and half of the remaining estate. Effective October 1, 2011, the legislation amends Florida Statute § 732.102(2) so that the intestate share of a surviving spouse of a decedent where all of the decedent's descendants are also descendants of the surviving spouse (or if there are no descendants) is the entire estate. The legislation also creates Florida Statute § 732.102(4) to provide that if the surviving spouse has descendants that are also the decedent's descendants and has descendants not related to the decedent, the surviving spouse's intestate share is half of the estate.

## II. Reformation of a Will

Reformation of a testamentary document is an effective, yet often times overlooked, probate litigator's technique to reform a document to conform to the settlor's intent. Since 1998, Florida case law permitted reformation of a trust instrument to correct a mistake. See *In re Estate of Robinson*, 720 So. 2d 540 (Fla. 4th DCA 1998). In 2007, the Florida legislature codified and expanded common law to permit reformation to correct a trust to cure a mistake as well as reformation of a trust to achieve a settlor's tax objectives. See Fla. Stats. §§ 736.0415 and 736.0416.

Effective July 1, 2011, the legislation created Florida Statutes §§ 732.615 and 732.616. These statutes mirror the above-referenced trust code statutes to permit reformation of a will to correct a mistake and to modify a will to achieve a testator's tax objectives. The mistake statute, Florida Statute § 732.615, allows an interested person to seek reformation of the terms of a will to conform to the testator's intent, and provides a burden of proof of clear and convincing evidence. The statute even permits reformation that is completely inconsistent with the apparent terms of the will.

The tax modification statute, Florida Statute § 732.616, permits an interested person to seek reformation of the terms of a will to achieve a testator's tax objectives in a manner that is not contrary to the testator's "probable intent." These statutes are significant because reformation of an unambiguous will was previously never permitted by case law or statute. In addition, the legislation creates Florida Statute § 732.1061 which requires that in actions under reformation of a will to correct a mistake and modification of a will to achieve tax objectives, the court must award attorney's fees and costs to the prevailing party. Nonetheless, the statute also gives the court discretion in awarding and allocating fees using the concept of equity.

## III. Challenges to Revocation of a Will and Trust

Florida law provides that a will or trust is void if procured by fraud, duress, mistake or undue influence. A testator or settlor may revoke a will or trust by writing or act. Until the legislation, there was no mechanism to challenge a revocation of a will or trust by

physical act based upon fraud, duress, mistake or undue influence. The legislation amends Florida Statutes §§ 732.5165 and 736.0406 to provide that revocation of a will or trust is void if procured by undue influence, fraud, duress or mistake. A challenge to the revocation of a testamentary document cannot take place until the instrument becomes irrevocable or at the settlor's demise.

#### **IV. Attorney-client Privilege relating to Fiduciaries**

Florida law provides that communication between an attorney and the client is confidential if it is not intended to be disclosed to third parties. The legislation clarifies and expands existing law so that communication between a fiduciary client and the attorney is confidential and privileged. See Fla. Stat. § 90.5021. The legislation also amends Florida Statutes §§ 733.212(2)(b) and 736.0813 which create new reporting requirements for personal representatives and trustees. The reporting requirement compels personal representatives and trustees to provide notice to the beneficiaries that an attorney-client privilege exists between the fiduciary and the attorney employed by the fiduciary. See Fla. Stats. §§ 733.212(2)(b) and 736.0813.

#### **V. Timing for Requesting Attorney's Fees in a Trust Matter**

The Florida Trust Code provides that trust proceedings are governed by the Florida Rules of Civil Procedure. In civil litigation, Florida Rule of Civil Procedure 1.525 is commonly used which requires a party to serve a motion seeking fees or costs within 30 days after the filing of a judgment. By amending Florida Statute § 736.0201(1), the legislation clarifies and confirms that Florida Rule of Civil Procedure 1.525 applies to all judicial proceedings concerning trusts.

The legislation also creates Florida Statute § 736.0201(6) which states that Florida Rule of Civil Procedure 1.525 applies to all judicial proceedings concerning trusts, but provides the following two exceptions: "A trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust [and] [a] determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made under s. [736.1004](#) in an action for

breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers.”

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