

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 492

INTRODUCER: Senator Hukill

SUBJECT: Estates

DATE: February 18, 2013 REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Shankle	Cibula	JU BI	<u>Pre-meeting</u>
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I. Summary:

SB 492 makes a number of changes to the Florida Probate Code, which were recommended by the Real Property, Probate, and Trust Law Section of The Florida Bar. These changes include:

- Reducing to 2 years from 5 years the time period in which property held in a trust is presumed to be unclaimed property and payable to the Department of Financial Services.
- Providing that a caveator is not required to serve notice on his or herself when he or she submits a petition for administration of an estate.
- Making void, with certain exceptions, any gift received by a lawyer, or a relative of the lawyer, from a written instrument that the lawyer prepared.
- Requiring that a clerk of court, upon receipt of a will, keep the will in its original form for 20 years.
- Expanding the long-arm jurisdiction of Florida Courts to adjudicate trust disputes.
- Removing conflicts between statute and the Florida Rules of Civil procedure over *forum non conveniens*.
- Requiring that a trustee provide a trust accounting to beneficiaries at least once a year.

This bill substantially amends the following sections of the Florida Statutes: 717.101, 717.112, 731.110, 731.703, 732.901, 736.0103, 736.0202, 736.0813, 607.0802, 731.201, 733.212, 736.0802, 735.08125, and 738.104.

This bill creates the following sections of the Florida Statutes: 717.1125, 732.0806, and 736.02025.

This bill repeals sections 736.0205 and 736.0807(4) of the Florida Statutes.

II. Present Situation:

Unclaimed Property

Chapter 717, F.S., details how to determine whether property held by a fiduciary is unclaimed and how to dispose of it. This includes trustees of trust administered pursuant to chapter 736, F.S., of the Florida Statutes. Currently, any intangible property or income held in a fiduciary capacity for the benefit of another is presumed unclaimed if within 5 years after the property becomes distributable the owner has not interacted with the property. Interaction includes increasing or decreasing the principal, accepting payment of the principal or income, communicating with fiduciary about the property, or otherwise indicating interest as evidenced by a record on file with the fiduciary.¹

Once the 5-year period elapses, the trustee may file a petition with the Department of Financial Services and request that the department accept custody of the property.² Upon delivery of property to the department, the state assumes custody and responsibility for the safekeeping of the property. As long as the person who delivers the property to the department has done so in good faith, he or she is relieved of any liability to manage the property.³

Caveat Notice Requirements

Section 731.110, F.S., allows an interested party to file a caveat with the circuit court preventing an estate from being administered or a will from being submitted to probate without formal notice being served on the caveator.⁴ Based on the wording of the statute, if the caveator files for administration of the estate some courts have required the caveator to file notice on him or herself.⁵

Gifts to Lawyers

Under the Rules Regulating the Florida Bar, a lawyer “shall not solicit any substantial gift from a client, including a testamentary gift or prepare on behalf of a client an instrument giving the lawyer or person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to client.”⁶ However, Florida courts have found that, with no prohibition in statute, a violation of Rule 4-1.8(c), R. Regulating Fla. Bar, does not render a gift to the lawyer void.⁷ Instead, an interested party must show fraud, undue influence, or duress in the creation of the will to have the gift voided.⁸

¹ Section 717.112(1), F.S.

² Section 717.117(5), F.S.

³ Section 717.1201(5), F.S.

⁴ Sections 731.110(1) and 731.110(3), F.S.

⁵ Real Property, Probate, and Trust Law Section of The Florida Bar, *White paper: Proposed Amendment to s. 731.110(3)*, Fla. Stat. (2013) (on file with the Senate Committee on Judiciary).

⁶ R. Regulating Fla. Bar 4-1.8(c).

⁷ *Agee v. Brown*, 73 So. 3d 882, 886 (Fla. 4th DCA 2011).

⁸ *Id.*

Retention of Original Wills and Codicils

Under s. 732.901, F.S., all original wills must be deposited by the will's custodian with the clerk of court having venue over the estate, within 10 days of learning of the decedent's death.⁹ The clerk must retain the original will for safekeeping for 20 years.¹⁰ However, the Florida Supreme Court is currently considering changes to the Rules of Judicial Administration which, once a probate proceeding is initiated, may allow for the clerk to create an electronic copy of the will and destroy the original.¹¹

Jurisdiction over Trustees and Trust Beneficiaries

Current Florida law does not contain a comprehensive long-arm statute for litigation relating to a trust. The Florida Supreme Court, following decisions by the United States Supreme Court, has ruled that if there is a statute authorizing jurisdiction and if the defendant has sufficient minimum contacts with Florida such that maintaining the suit does not offend traditional notions of fair play and substantial justice, a Florida court may exercise jurisdiction over the defendant.¹² The minimum contacts test is a factual analysis insuring that a defendant's constitutional right to due process is not violated.¹³ The statute authorizing the jurisdiction is called a long-arm statute.

The Real Property, Probate, and Trust Law Section of The Florida Bar is concerned that the long-arm statute in s. 48.193(1), F.S., is too generic to authorize jurisdiction over all necessary parties in a trust dispute, including nonresidents.¹⁴ Section 736.0202(1), F.S., allows Florida courts to acquire personal jurisdiction over nonresidents if he or she accept a trusteeship of a trust having its principal place of administration in Florida, or he or she moves the principal place of administration of a trust to Florida. However, this leaves a number of scenarios in which Florida courts do not have express authority for jurisdiction over all necessary parties. Examples of necessary parties unaccounted for by s. 736.0202(1), F.S., include a beneficiary who accepts compensation from a trust or a person who performs a service for a trust, if the trust has its principle place of business in Florida.

While on its face, s. 736.0205, F.S., appears to be a statute establishing jurisdiction, courts have interpreted it to be a *forum non conveniens* statute that requires a court to determine the "most appropriate forum" in which a case should proceed.¹⁵ Courts have suggested that the statute shifts to the plaintiff the burden of proving that the choice of venue is appropriate.¹⁶ However, this conflicts with Florida Rule of Civil Procedure 1.061 which provides that the defendant has the burden of pleading and proving the facts necessary to obtain a change of venue. Thus, the

⁹ Section 732.901(1), F.S.

¹⁰ Florida Dep't of State, *General Records Schedule GS11 for Clerks of Court* (January 1, 2010), available at <http://dls.dos.state.fl.us/barm/genschedules/GS11-2010.pdf>.

¹¹ Real Property, Probate, and Trust Law Section of The Florida Bar, *White paper: Proposed Amendment to s. 732.901, Fla. Stat.* (2013) (on file with the Senate Committee on Judiciary).

¹² *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500-501 (Fla. 1989).

¹³ *Id* at 500.

¹⁴ Real Property, Probate and Trust Law Section of the Florida Bar, *White paper: Proposed Statutes on Acquiring Jurisdiction over Trustees and Trust Beneficiaries and Repealing s. 736.0205* (2013) (on file with the Senate Committee on Judiciary).

¹⁵ *In Re: Estate of McMillian*, 603 So. 2d 685, 688 (Fla. 1st DCA 1992).

¹⁶ *Id.*

relationship between the statute and the rule of civil procedure creates confusion as to the correct placement of burden of proof for *forum non conveniens* issues.

Trust Accounting

Under current Florida law, a trustee of an irrevocable trust must provide an annual accounting of the trust to every beneficiary. The accounting must address the cash and property transactions in the accounting period and what trust assets are currently on hand.¹⁷

III. Effect of Proposed Changes:

Unclaimed property held in Trust (Sections 1, 2, and 3)

The bill creates s. 717.1125, F.S., which reduces to 2 years from 5 years the time period after which property held in a trust is presumed to be unclaimed property and payable to the Department of Financial Services. However, the bill amends s. 717.112(1), F.S., to preserve existing procedures for a personal representative of an estate to deposit unclaimed funds into the registry of the court.

Caveat Notice Requirements (Section 4)

The bill amends s. 731.110, F.S., to clarify that a caveator is not required to serve formal notice of his or her own petition for administration of an estate on his or herself.

Gifts to Lawyers (Section 6)

The bill creates s. 732.806, F.S., which voids, with certain exceptions, any part of a written instrument that a lawyer prepared or supervised which makes a gift to a lawyer or a person related to the lawyer. However, the restriction on gifts does not affect:

- Gifts to a lawyer or other person if the lawyer or other person is related to the person making the gift.
- A written instrument appointing a lawyer, or other person related to the lawyer, as a fiduciary.
- Title to property acquired for value from a person who receives the property in violation of the restrictions on gifts.

The bill makes any provision of the instrument which attempts to waive s. 732.806, F.S., unenforceable. The bill also expressly provides that it does not preempt any other rights or remedies of interested parties which may be available in equity.

Retention of Original Wills and Codicils (Section 7)

The bill amends s. 732.901, F.S., in anticipation of changes to the Rules of Judicial Administration, clarifying that a clerk of court, upon receipt of a will, must keep the will in its original form for 20 years. Transferring and storing the will in an electronic format does not negate the requirement that the will be preserved in its original form. The bill also requires that a

¹⁷ Sections 736.0813 and 736.01835, F.S.

custodian supply only the last 4 digits of the testator's social security number to the clerk of court upon deposit of the will, instead of the entire number.

Jurisdiction Over Trustees and Trust Beneficiaries (Sections 8, 9, 10, 11, and 12)

The bill amends s. 736.0202(1), F.S., making it a standalone provision governing *in rem* jurisdiction over beneficiaries' interests in a trust. Additionally, the bill amends s. 736.0202(2), F.S., to create a comprehensive long-arm statute for litigation of trusts. It specifies acts or conduct that allows Florida courts to acquire personal jurisdiction over a nonresident trustee, trust beneficiary, or other person, as long as the constitutional due process requirement of minimum contacts with the state is met. These acts include:

- A trustee who accepts a trust if the principle place of business of the trust is in Florida.
- A trustee who moves a trust to Florida.
- A trustee who commits a breach of a trust in this state.
- A beneficiary or person who accepts distribution or compensation from a trust if the principle place of business of the trust is in Florida.
- A person who performs a service for a trust when the principle place of business of the trust is in Florida.

The bill also includes a catch-all provision that allows a court to exercise jurisdiction to the maximum extent permitted by the State Constitution or the Federal Constitution.

The bill creates s. 736.02025, F.S., which provides for service of process for the litigation of trust as laid out in chapter 48, F.S., the general statute on service of process.¹⁸ Section 736.02025, F.S., also provides for service of process by mail or commercial delivery service if the case involves an interest in trust property but does not seek a personal jurisdiction. Finally, it allows for service by first-class mail in certain limited circumstances.

The bill repeals s. 731.0205, F.S., which eliminates any potential conflicts between the statute and Rule 1.061 Fla. R. Civ. P. over *forum non conveniens*.

Trust Accounting (Section 13)

The bill amends s. 736.0813 F.S., to require that the trustee provide a trust accounting at least once a year from the date of the last accounting or, if there has been no previous accounting, the date that trustee became accountable.

Technical Changes (Sections 14, 15, 16, 17, 18, 19 and 20)

The bill amends ss. 607.0802, 731.201, 733.212, 736.0802, 736.08125, and 738.104, F.S., to conform cross-references to changes made by the bill.

The bill takes effect on October 1, 2013.

¹⁸ See Chapter. 48, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will prevent financial benefits from passing to a lawyer in favor other beneficiaries.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.