

FLORIDA LEGISLATIVE UPDATE

*Presented for the Clearwater Bar Association
Probate & Real Property Section*

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BY

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I. Homestead Law Changes

A. Lifetime transfers

F.S. § 732.4017 (p. 10) provides that a lifetime transfer of homestead is not a devise and, thus, will not be subject to the constitutional restrictions on devise as long as the following two conditions are met:

1. the owner validly conveys his interest in the homestead during his lifetime to someone other than himself, either outright or in trust; and
2. the owner does not retain any power to revoke the transfer or re-vest the transferred interest in himself.

The owner can retain a beneficial interest in the property, such as the right to live in the property during his lifetime. For conveyances in trust, the owner can retain the power to alter the rights of the beneficiaries included in the original trust agreement (no new beneficiaries can be added) *during his lifetime* as long as the power cannot be used to benefit the owner.

B. Improper devise or failure to devise

To deal with the issue of a spouse receiving a life estate that he or she cannot afford, F.S. § 732.401 (pp. 11-13) was revised to add a provision that gives the surviving spouse the *option* to elect an undivided one-half interest as a tenant in common in the homestead with the remaining undivided one-half interest passing to the owner's descendants, per stripes. The election is irrevocable and must be made during the surviving spouse's lifetime within six months of the owner's death.

C. Disclaimer by the surviving spouse

F.S. § 732.4015 was revised to clarify the effect of a disclaimer of the homestead by the surviving spouse.

1. Homestead validly devised to surviving spouse - F.S. § 732.4015(3) (p. 13)
 - Disclaimer is effective
 - Homestead passes according to owner's will or trust

* The author gratefully acknowledges the help of Jacqueline M. Fellows, Esq. in drafting this outline.

2. Homestead invalidly devised - F.S. § 732.401(4) (p. 12)
 - Disclaimer ineffective to divest the interests of the owner's descendants
 - Homestead passes to owner's descendants, per stirpes

II. Changes to the administration of Irrevocable Life Insurance Trusts (“ILIT”) under the Florida Trust Code

F.S. § 736.0902 (pp. 14-15) was added to the Florida Trust Code effective July 1, 2010. It makes the prudent investor rule (F.S. § 518.11) and the duty to administer a trust as a prudent person (F.S. § 736.0804) inapplicable to certain trusts. The new statute is applicable to ILITs and to other trusts holding life insurance contracts on a qualified person.

- A. A “qualified person” is:
 - the insured, if the insured gives the trustee the money to pay the premiums for a policy on his life and/or his spouse's life; or
 - the spouse of a person described in (1).
- B. Duties eliminated
 1. Verify the policy meets insurable interest requirements;
 2. Determine whether policy is a good investment;
 3. Make sure life insurance company is financially sound;
 4. Diversify the trust's investments;
 5. Decide whether to exercise various policy options; and
 6. Be knowledgeable about the insured's physical and financial health.
- C. When does the statute apply?
 - Elimination of duty #1 – applies to all trusts unless the trust instrument specifically requires the trustee to verify the insurable interest or the trustee has knowledge that the policy was acquired without an insurable interest.
 - Elimination of duties #2-6 – applies only if the trust instrument expressly states that F.S. § 736.0902 applies or if the trustee sends notice of his intent to have the statute apply to all qualified beneficiaries and no qualified beneficiary objects within 30 days of receipt of such notice.

III. Florida's Estate Tax Patch

In 2010, the estate tax and generation skipping tax have been suspended. This suspension has created ambiguity and unintended consequences because many estate plans use formulas related to the "estate tax exemption", the "generation skipping transfer tax exemption", and/or the "applicable credit amount". The Florida estate tax patch provides new statutes for limited judicial construction of irrevocable trusts and wills with certain federal tax provisions.

A. Wills – F.S. § 733.1051 (pp. 16-17)

- Applies as of January 1, 2010, and remains in effect until the earlier of December 31, 2010 or the day before the date upon which a law repealing or modifying s. 901 of The Economic Growth and Tax Relief Reconciliation Act of 2001 is enacted.
- The trustee or a person who is, or may be, a beneficiary who is affected by the outcome of the construction, can elect to apply the statute.
- Applies to wills that contain a formula disposition, measure a share of a trust based on the amount that can pass free of federal estate tax or generation-skipping transfer tax, make a disposition referring to a marital or charitable deduction, or appear to be intended to reduce or minimize federal estate tax or generation-skipping transfer tax.
- In construing the will, the court must consider the terms and purposes of the will, the facts and circumstances surrounding the creation of the will, and the testator's probable intent.
- The personal representative is allowed to delay making distributions, incur and pay fees and costs to determine its duties and obligations, and maintain reserves for the payment of fees and costs and reasonably anticipated future federal taxes. The personal representative is not liable for such actions if they are taken in good faith.
- This statute does NOT apply if the will provides for what happens if there is no federal estate tax or generation-skipping transfer tax.

B. Trusts – F.S. § 736.04114 (pp. 18-19)

- Applies as of January 1, 2010 and remains in effect until the earlier of December 31, 2010 or the day before the date upon which a law

repealing or modifying s. 901 of The Economic Growth and Tax Relief Reconciliation Act of 2001 is enacted.

- The trustee or any qualified beneficiary can elect to apply the statute.
- Applies to trusts that contain a formula disposition, measure a share of a trust based on the amount that can pass free of federal estate tax or generation-skipping transfer tax, make a disposition referring to a marital or charitable deduction, or appear to be intended to reduce or minimize federal estate tax or generation-skipping transfer tax.
- In construing the trust, the court must consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust and the settlor's probable intent.
- The trustee is allowed to delay making distributions, incur and pay fees and costs to determine its duties and obligations, and maintain reserves for the payment of fees and costs and reasonably anticipated future federal taxes. The trustee is not liable for such actions if they are taken in good faith.
- This statute does NOT apply if the trust instrument provides for what happens if there is no federal estate tax or generation-skipping transfer tax.

IV. QTIP Trust Changes

F.S. § 736.0505 (pp. 20-21) was revised to add a provision that ensures assets passing in trust for the settlor of an Inter Vivos QTIP trust after the death of the settlor's spouse are not considered to be held in a self-settled trust as long as the initial transfer in trust was not a fraudulent conveyance. Thus, the creditors of the settlor will not be able to reach the trust assets under F.S. § 736.0505(1)(b) because the settlor will not be treated as the settlor of the trust after the death of the donee spouse.

V. Post-Death Challenges to Spousal Rights Procured by Fraud, Duress, or Undue Influence

Effective October 1, 2010, new F.S. § 732.805 (pp. 22-23) allows for post-death challenges to spousal rights that derive solely from marriages procured by fraud, duress, or undue influence. This new statute does not challenge the validity of the marriage itself, just the spousal rights. If a marriage is found to have been procured by fraud, duress, or undue influence, then the property addressed under this statute that would have passed to the surviving spouse will pass as if the surviving spouse had predeceased the decedent.

A. Rights affected

- All rights or benefits under the Florida Probate Code
- Default rights or benefits under bonds, life insurance policies, or other contractual arrangements in which the decedent was the principal obligee (note: this does not apply if the spouse was specifically named as the beneficiary)
- Rights or benefits under wills, trusts, or powers of appointments that use the term “spouse” rather than the spouse’s name

B. Presumptions and defenses

- The immunity from the presumption of undue influence afforded to spouses under current Florida law is removed for spouses who are found to have procured marriage by fraud, duress, or undue influence.
- Subsequent ratification by both spouses of a marriage procured by fraud, duress, or undue influence can be raised as a defense by the surviving spouse. Voluntary cohabitation as husband and wife with full knowledge of the facts constituting the fraud, duress, or undue influence is strong evidence of ratification.

C. Procedural aspects

- Challenges to the surviving spouse’s rights under this statute can be used by any interested person as a defense, objection, or cause of action after the decedent’s death. Such challenges may be brought in any proceeding in which the fact of marriage may be material.
- Burden of proof:
 - The challenger has the burden of proving that the marriage was procured by fraud, duress, or undue influence by a preponderance of the evidence.
 - If the surviving spouse raises ratification as a defense, the surviving spouse has the burden of establishing ratification by both spouses by a preponderance of the evidence.
- The court shall award taxable costs, including attorney’s fees, as in chancery actions. The court has discretion to direct some or all of such costs to be paid from the losing party’s interest in the estate.

- Any action under this statute must be brought within four (4) years of the decedent's death or it will be barred. However, it is possible for such an action to be barred earlier by adjudication, estoppel, or a provision of the Florida Probate Code or the Probate Rules.

D. Protection of institutions

- Any financial institution, insurance company, etc. that makes payment to a surviving spouse pursuant to the terms of its policy/contract will not be liable for such payment as long as it had not received written notice of a claim under this statute prior to making the payment.
- Written notice of a claim under this statute must be delivered to the appropriate institution in a manner that is reasonable under the circumstances and likely to result in receipt. The notice must contain sufficient information to inform the institution of the account involved and is not effective until five (5) business days after delivery. The notice must be directed to an officer or manager of the institution.

VI. Additional Trust Code Changes

A. A provision was added to both F.S. § 733.607 (p. 24) and F.S. § 736.05053 (p. 25-26) to clarify that specific gifts under a decedent's will and trust will not be appropriated to pay expenses of administration or debts of the probate estate if there are residuary assets in the probate estate or trust available. A specific reference to F.S. § 733.805, the abatement statute, was added to both statutes.

B. Subsections (7) and (9) of F.S. § 736.1007, which provide authority for the court to award and determine the amount of attorney's fees for a trustee's attorney, were deleted as duplicative; F.S. § 736.0206(4)-(5) (p. 27) already address those issues. F.S. § 736.0206 was amended to change the provision that the court "shall" award reasonable expert witness fees to the court "may" award reasonable expert witness fees to be paid from trust assets "unless the court finds that the expert testimony did not assist the court." The notice provisions of the statute were deleted; the Rules of Civil Procedure govern notice requirements.

C. F.S. § 736.0505 (p. 20-21) was amended to clarify that if spouses make contributions to an irrevocable trust using a split gift election, then two (2) annual exclusion amounts for gift tax purposes are exempt from the claims of the creditors of a beneficiary who has the right to withdraw the trust contributions once the power to withdraw lapses, is released, or is waived.

D. F.S. § 736.1211 (p. 28) was created and provides that charitable organizations and trusts cannot be compelled to disclose the race, religion, gender,

national origin, socioeconomic status, age, ethnicity, disability, marital status, sexual orientation, or political party registration of their employees, officers, directors, trustees, members, or owners without such parties' written consent.

VII. Additional Probate Code Changes (All Changes Effective October 1, 2010)

A. F.S. § 655.935 (p. 29) was amended to require the lessor of a safe-deposit box to make a complete copy of any document removed from the box pursuant to the statute and place the copy in the box along with a record of the officer who delivered the document, the date the document was removed, and the name of the person who removed the document and his relationship to the decedent. The statute allows lessors to charge reasonable fees to cover costs incurred in complying with the statute.

B. F.S. § 731.110 (p. 30) was amended to provide that interested persons other than creditors may file a caveat prior to a decedent's death. Such caveat is effective for two (2) years and must be re-filed after the two-year period expires. Creditors can only file a caveat after the decedent's death. The amended statute no longer sets out the requirements for what information must be included in the caveat; the requirements can be found in Florida Probate Rule 5.260. The statute was also amended to be consistent with Florida Probate Rule 5.260 and now requires the designation of a resident agent only if the caveator is not a resident of Florida or is not represented by a Florida attorney who signs the caveat.

C. F.S. § 731.201 (p. 31) was amended to clarify the definitions of formal notice and informal notice. F.S. § 731.201(18) now defines formal notice as "a form of notice that is described in and served by a method of service provided under rule 5.040(a) of the Florida Probate Rules." F.S. § 731.201(22) now defines informal notice as "a method of service for pleadings or papers as provided under rule 5.040(b) of the Florida Probate Rules."

D. F.S. § 731.301(2) (p. 31) was amended to clarify that serving a person with formal notice is sufficient to obtain jurisdiction over him to the extent of his interest in the decedent's estate or homestead property (unless the homestead property was titled in the name of the trustee of the decedent's revocable trust – then a civil summons must be used to obtain jurisdiction).

E. F.S. § 732.608 (Probate Code) (p. 32) and F.S. § 736.1102 (Trust Code) (p. 32) were amended to clarify that the "laws" are used to determine paternity and relationships for intestate succession. Prior to the amendment, the statutes used the term "rules".

F. F.S. § 733.2123 (p. 32) was amended to remove the requirement that a copy of the decedent's will be attached to the formal notice of the petition for administration served on interested persons.

G. The language of F.S. § 732.2125 (p. 32) was amended to clarify that a court must approve the election to take an undivided one-half interest in the decedent's homestead instead of a life estate when the election is made by a guardian on behalf of the surviving spouse. The election must be in the best interests of the surviving spouse.

VIII. On the Horizon

A. Intestacy Statute

The Real Property, Probate and Trust Law (RPPTL) Section of the Florida Bar has passed a proposal to amend F.S. § 732.102 with the goal of making the intestate distribution scheme more in line with what the average, non-lawyer thinks it would be. If this legislation is passed, it will become effective October 1, 2011.

Under the proposed statute, if a person dies leaving a spouse and all descendants of the decedent and the surviving spouse are descendants of the decedent and the surviving spouse together, then the surviving spouse receives 100% of the decedent's intestate estate. If either the decedent or the surviving spouse has descendants from a different relationship, then the surviving spouse receives 50% of the decedent's intestate estate and the decedent's descendants receive the remaining 50%.

B. Divorce Statute – IRAs and Life Insurance

Legislation is pending that will provide that upon divorce, any IRA or life insurance beneficiary designations in favor of the ex-spouse that remain unchanged will be ineffective as to the surviving ex-spouse. The surviving ex-spouse will be treated as if he predeceased the decedent.

C. *Robertson* "Fix"

The RPPTL Section has proposed legislation that would negate the *Robertson* decision with regard to inherited IRAs. The proposed legislation provides that *all* inherited IRAs are exempt from the claims of the decedent's creditors.

D. *Olmstead* "Patch"

The RPPTL Section is also in the process of drafting legislation in response to the *Olmstead* decision. *Olmstead* left open the possibility that multi-

member LLCs could be subject to remedies other than charging orders, such as foreclosure of a member's interest. The proposed legislation would provide that charging orders are the *exclusive* remedy for enforcing a judgment against multi-member LLCs.

Circular 230 Disclosure: Pursuant to requirements related to practice before the Internal Revenue Service, any tax advice contained in this communication (including any attachments) is not intended to be used, and cannot be used, for purposes of recommending to another person any tax related matter. To the extent this communication (including any attachments) contains an opinion on one or more Federal tax issues such opinion was not written to be used and cannot be used for the purpose of avoiding penalties. If you would like a written opinion on the one or more Federal tax issues addressed above upon which you can rely for the purpose of avoiding penalties please contact me.

732.4017 - Inter vivos transfer of homestead property.

(1) If the owner of homestead property transfers an interest in that property, including a transfer in trust, with or without consideration, to one or more persons during the owner's lifetime, the transfer is not a devise for purposes of s. 731.201(10) or s. 732.4015, and the interest transferred does not descend as provided in s. 732.401 if the transferor fails to retain a power, held in any capacity, acting alone or in conjunction with any other person, to revoke or revest that interest in the transferor.

(2) As used in this section, the term "transfer in trust" refers to a trust under which the transferor of the homestead property, alone or in conjunction with another person, does not possess a right of revocation as that term is defined in s. 733.707(3)(e). A power possessed by the transferor which is exercisable during the transferor's lifetime to alter the beneficial use and enjoyment of the interest within a class of beneficiaries identified only in the trust instrument is not a right of revocation if the power may not be exercised in favor of the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate or exercised to discharge the transferor's legal obligations. This subsection does not create an inference that a power not described in this subsection is a power to revoke or revest an interest in the transferor.

(3) The transfer of an interest in homestead property described in subsection (1) may not be treated as a devise of that interest even if:

(a) The transferor retains a separate legal or equitable interest in the homestead property, directly or indirectly through a trust or other arrangement such as a term of years, life estate, reversion, possibility of reverter, or fractional fee interest;

(b) The interest transferred does not become a possessory interest until a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, the death of the transferor; or

(c) The interest transferred is subject to divestment, expiration, or lapse upon a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, survival of the transferor.

(4) It is the intent of the Legislature that this section clarify existing law.

History.— s. 9, ch. 2010-132.

732.401 - Descent of homestead.

(1) If not devised as authorized by law and the constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

(a) The right of election may be exercised:

1. By the surviving spouse; or
2. With the approval of a court having jurisdiction of the real property, by an attorney in fact or guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in the best interests of the surviving spouse during the spouse's probable lifetime.

(b) The election must be made within 6 months after the decedent's death and during the surviving spouse's lifetime. The time for making the election may not be extended except as provided in paragraph (c).

(c) A petition by an attorney in fact or guardian of the property for approval to make the election tolls the time for making the election until 6 months after the decedent's death or 30 days after the rendition of an order authorizing the election, whichever occurs last.

(d) Once made, the election is irrevocable.

(e) The election shall be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located. The notice must be in substantially the following form:

ELECTION OF SURVIVING SPOUSE
TO TAKE A ONE-HALF INTEREST OF
DECEDENT'S INTEREST IN
HOMESTEAD PROPERTY

STATE OF
COUNTY OF

1. The decedent, _____, died on _____. On the date of the decedent's death, the decedent was married to _____, who survived the decedent.
2. At the time of the decedent's death, the decedent owned an interest in real property that the affiant believes to be homestead property described in s. 4, Article X of the State Constitution, that real property being in _____ County, Florida, and described as: (description of homestead property).
3. Affiant elects to take one-half of decedent's interest in the homestead as a tenant in common in lieu of a life estate.
4. If affiant is not the surviving spouse, affiant is the surviving spouse's attorney in fact or guardian of the property and an order has been rendered by a court having jurisdiction of the real property authorizing the undersigned to make this election.

(Affiant)

Sworn to (or affirmed) and subscribed before me this ____ day of (month), (year), by
(affiant)

(Signature of Notary Public-State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification
(Type of Identification Produced)

(3) Unless and until an election is made under subsection (2), expenses relating to the ownership of the homestead shall be allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen, in accordance with chapter 738. If an election is made, expenses relating to the ownership of the homestead shall be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares, effective as of the date the election is filed for recording.

(4) If the surviving spouse's life estate created in subsection (1) is disclaimed pursuant to chapter 739, the interests of the decedent's descendants may not be divested.

(5) This section does not apply to property that the decedent owned in tenancy by the entireties or joint tenancy with rights of survivorship.

History.— s. 1, ch. 74-106; s. 17, ch. 75-220; s. 37, ch. 2001-226; s. 12, ch. 2007-74; s. 7, ch. 2010-132.

Note.— Created from former s. 731.27.

732.4015 - Devise of homestead.

(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.

(2) For the purposes of subsection (1), the term:

(a) "Owner" includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the grantor's death as if the interest held in trust was owned by the grantor.

(b) "Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead.

(3) *If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse's interest is disclaimed, the disclaimed interest shall pass in accordance with chapter 739.*

History.— s. 1, ch. 74-106; ss. 18, 30, ch. 75-220; s. 16, ch. 92-200; s. 959, ch. 97-102; s. 38, ch. 2001-226; s. 13, ch. 2007-74; s. 8, ch. 2010-132.

736.0902 - Nonapplication of prudent investor rule.

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(1) Notwithstanding the provisions of s. 518.11 or s. 736.0804, with respect to any contract for life insurance acquired or retained on the life of a qualified person, a trustee has no duty to:

(a) Determine whether the contract of life insurance is or was procured or effected in compliance with s. 627.404;

(b) Determine whether any contract of life insurance is, or remains, a proper investment;

(c) Investigate the financial strength of the life insurance company;

(d) Determine whether to exercise any policy option available under the contract for life insurance;

(e) Diversify any such contract for life insurance or the assets of the trust with respect to the contract for life insurance; or

(f) Inquire about or investigate the health or financial condition of any insureds.

(2) For purposes of this section, a “qualified person” is a person who is insured or a proposed insured, or the spouse of that person, who has provided the trustee with the funds used to acquire or pay premiums with respect to a policy of insurance on the life of that person or the spouse of that person, or on the lives of that person and the spouse of that person.

(3) The trustee is not liable to the beneficiaries of the trust or any other person for any loss sustained with respect to a contract for life insurance to which this section applies.

(4) Unless otherwise provided in the trust instrument, paragraph (1)(a) applies to any contract for life insurance on the life of a qualified person.

(5) Unless otherwise provided in the trust instrument, paragraphs (1)(b)-(f) apply if:

(a) The trust instrument, by reference to this section, makes this section applicable to contracts for life insurance held by the trust; or

(b) The trustee gives notice that this section applies to a contract for life insurance held by the trust.

1. The notice of the application of this section shall be given to the qualified beneficiaries and shall contain a copy or restatement of this section.
2. Notice given pursuant to any of the provisions of part III of this chapter to a person who represents the interests of any of the persons set forth in subparagraph 1. shall be treated as notice to the person so represented.
3. Notice shall be given in the manner provided in s. 736.0109.
4. If any person notified pursuant to this paragraph delivers a written objection to the application of this section to the trustee within 30 days after the date on which the objector received such notice, paragraphs (1)(b)-(f) shall not apply until the objection is withdrawn.
5. There shall exist a rebuttable presumption that any notice sent by United States mail is received 3 days after depositing the notice in the United States mail system with proper postage prepaid.

(6) This section does not apply to any contract for life insurance purchased from any affiliate of the trustee, or with respect to which the trustee or any affiliate of the trustee receives any commission unless the duties have been delegated to another person in accordance with s. 518.112. For purposes of this subsection, an “affiliate” is any person who controls, is controlled by, or is under common control with the trustee.

(7) Paragraph (1)(a) does not apply if the trustee applied for or accepted ownership of a contract of life insurance and the trustee had knowledge that:

(a) The benefits were not payable to a person specified in s. 627.404 when the contract of life insurance was issued; or

(b) The contract of life insurance is or was purchased with resources or guarantees directly or indirectly provided by a person who, at the time of the inception of such contract, did not have an insurable interest in the insured as defined by s. 627.404, and, at the time of the inception of such contract, there is a verbal or written arrangement, agreement, or plan with a third party to transfer ownership of the policy or policy benefits in a manner that would be in violation of state law.

(8) A trustee who performs fiduciary or advisory services related to a policy of life insurance to which subsection (1) applies shall not be compensated for performing the applicable service to which subsection (1) applies.

History.— s. 1, ch. 2010-172.

733.1051 - Limited judicial construction of will with federal tax provisions.

—
(1) Upon the application of a personal representative or a person who is or may be a beneficiary who is affected by the outcome of the construction, a court at any time may construe the terms of a will to define the respective shares or determine beneficiaries, in accordance with the intention of a testator, if a disposition occurs during the applicable period and the will contains a provision that:

(a) Includes a disposition formula referring to the terms “unified credit,” “estate tax exemption,” “applicable exemption amount,” “applicable credit amount,” “applicable exclusion amount,” “generation-skipping transfer tax exemption,” “GST exemption,” “marital deduction,” “maximum marital deduction,” “unlimited marital deduction,” or “maximum charitable deduction”;

(b) Measures a share of an estate based on the amount that may pass free of federal estate tax or the amount that may pass free of federal generation-skipping transfer tax;

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

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

(2) For purposes of this section:

(a) The term “applicable period” means a period beginning January 1, 2010, and ending on the end of the day on the earlier of December 31, 2010, or the day before the date that an act becomes law that repeals or otherwise modifies or has the effect of repealing or modifying s. 901 of the Economic Growth and Tax Relief Reconciliation Act of 2001.

(b) A “disposition occurs” when the testator dies.

(3) In construing the will, the court shall consider the terms and purposes of the will, the facts and circumstances surrounding the creation of the will, and the testator’s probable intent. In determining the testator’s probable intent, the court may consider evidence relevant to the testator’s intent even though the evidence contradicts an apparent plain meaning of the will.

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

(5)(a) Unless otherwise ordered by the court, during the applicable period and without court order, the personal representative administering a will containing one or more provisions described in subsection (1) may:

1. Delay or refrain from making any distribution.
2. Incur and pay fees and costs reasonably necessary to determine its duties and obligations, including compliance with provisions of existing and reasonably anticipated future federal tax laws.
3. Establish and maintain reserves for the payment of these fees and costs and federal taxes.

(5)(b) The personal representative shall not be liable for its actions as provided in this subsection made or taken in good faith.

(6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to construe a will.

(7) This section is remedial in nature and intended to provide a new or modified legal remedy. This section shall operate retroactively to January 1, 2010.

History.— s. 12, ch. 2010-132.

736.04114 - Limited judicial construction of irrevocable trust with federal tax provisions.

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

(a) Includes a formula disposition referring to the “unified credit,” “estate tax exemption,” “applicable exemption amount,” “applicable credit amount,” “applicable exclusion amount,” “generation-skipping transfer tax exemption,” “GST exemption,” “marital deduction,” “maximum marital deduction,” “unlimited marital deduction,” or “maximum charitable deduction”;

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

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

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

(2) For the purpose of this section:

(a) “Applicable period” means a period beginning January 1, 2010, and ending on the end of the day on the earlier of:

1. December 31, 2010; or

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

(b) A “disposition occurs” when an interest takes effect in possession or enjoyment.

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

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

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

(a) Delay or refrain from making any distribution;

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

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

The trustee is not liable for its actions as provided in this subsection which are made or taken in good faith.

(6) The provisions of this section are in addition to, and not in derogation of, rights under this code or the common law to construe a trust.

(7) This section is remedial in order to provide a new or modified legal remedy. This section applies retroactively and is effective as of January 1, 2010.

History.— s. 4, ch. 2010-122.

736.0505 - Creditors' claims against settlor.

(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor.

(b) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(c) Notwithstanding the provisions of paragraph (b), the assets of an irrevocable trust may not be subject to the claims of an existing or subsequent creditor or assignee of the settlor, in whole or in part, solely because of the existence of a discretionary power granted to the trustee by the terms of the trust, or any other provision of law, to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal which is payable by the settlor under the law imposing such tax.

(2) For purposes of this section:

(a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power.

(b) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in:

1. Section 2041(b)(2) or s. 2514(e); or

2. Section 2503(b) **and, if the donor was married at the time of the transfer to which the power of withdrawal applies, twice the amount specified in s. 2503(b)**, of the Internal Revenue Code of 1986, as amended.

(3) **Subject to the provisions of s. 726.105, for purposes of this section, the assets in:**

(a) A trust described in s. 2523(e) of the Internal Revenue Code of 1986, as amended, or a trust for which the election described in s. 2523(f) of the Internal Revenue Code of 1986, as amended, has been made; and

(b) Another trust, to the extent that the assets in the other trust are attributable to a trust described in paragraph (a), shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor.

History.— s. 5, ch. 2006-217; s. 5, ch. 2010-122.

732.805 - Spousal rights procured by fraud, duress, or undue influence.

(1) A surviving spouse who is found to have procured a marriage to the decedent by fraud, duress, or undue influence is not entitled to any of the following rights or benefits that inure solely by virtue of the marriage or the person's status as surviving spouse of the decedent unless the decedent and the surviving spouse voluntarily cohabited as husband and wife with full knowledge of the facts constituting the fraud, duress, or undue influence or both spouses otherwise subsequently ratified the marriage:

(a) Any rights or benefits under the Florida Probate Code, including, but not limited to, entitlement to elective share or family allowance; preference in appointment as personal representative; inheritance by intestacy, homestead, or exempt property; or inheritance as a pretermitted spouse.

(b) Any rights or benefits under a bond, life insurance policy, or other contractual arrangement if the decedent is the principal obligee or the person upon whose life the policy is issued, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the bond, life insurance policy, or other contractual arrangement.

(c) Any rights or benefits under a will, trust, or power of appointment, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the will, trust, or power of appointment.

(d) Any immunity from the presumption of undue influence that a surviving spouse may have under state law.

(2) Any of the rights or benefits listed in paragraphs (1)(a)-(c) which would have passed solely by virtue of the marriage to a surviving spouse who is found to have procured the marriage by fraud, duress, or undue influence shall pass as if the spouse had predeceased the decedent.

(3) A challenge to a surviving spouse's rights under this section may be maintained as a defense, objection, or cause of action by any interested person after the death of the decedent in any proceeding in which the fact of marriage may be directly or indirectly material.

(4) The contestant has the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence. If ratification of the marriage is raised as a defense, the surviving spouse has the burden of establishing, by a preponderance of the evidence, the subsequent ratification by both spouses.

(5) In all actions brought under this section, the court shall award taxable costs as in chancery actions, including attorney's fees. When awarding taxable costs and attorney's

fees, the court may direct payment from a party's interest, if any, in the estate, or enter a judgment that may be satisfied from other property of the party, or both.

(6) An insurance company, financial institution, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless, before payment, it received written notice of a claim pursuant to this section.

(a) The notice required by this subsection must be in writing and must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice. Permissible methods of notice include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed facsimile or other electronic message.

(b) To be effective, notice to a financial institution or insurance company must contain the name, address, and the taxpayer identification number, or the account or policy number, of the principal obligee or person whose life is insured and shall be directed to an officer or a manager of the financial institution or insurance company in this state. If the financial institution or insurance company has no offices in this state, the notice shall be directed to the principal office of the financial institution or insurance company.

(c) Notice shall be effective when given, except that notice to a financial institution or insurance company is not effective until 5 business days after being given.

(7) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or equity.

(8) Unless sooner barred by adjudication, estoppel, or a provision of the Florida Probate Code or Florida Probate Rules, an interested person is barred from bringing an action under this section unless the action is commenced within 4 years after the decedent's date of death. A cause of action under this section accrues on the decedent's date of death.

History.— s. 11, ch. 2010-132.

733.607 - Possession of estate.

(1) Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except the protected homestead, but any real property or tangible personal property may be left with, or surrendered to, the person presumptively entitled to it unless possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by a beneficiary is conclusive evidence that the possession of the property by the personal representative is necessary for the purposes of administration, in any action against the beneficiary for possession of it. The personal representative shall take all steps reasonably necessary for the management, protection, and preservation of the estate until distribution and may maintain an action to recover possession of property or to determine the title to it.

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

History.— s. 1, ch. 74-106; s. 28, ch. 77-87; s. 9, ch. 93-257; s. 9, ch. 95-401; s. 1005, ch. 97-102; s. 130, ch. 2001-226; s. 1, ch. 2010-122.

Note.— Created from former s. 733.01.

736.05053 - Trustee's duty to pay expenses and obligations of settlor's estate.

(1) A trustee of a trust described in s. 733.707(3) shall pay to the personal representative of a settlor's estate any amounts that the personal representative certifies in writing to the trustee are required to pay the expenses of the administration and obligations of the settlor's estate. Payments made by a trustee, unless otherwise provided in the trust instrument, must be charged as expenses of the trust without a contribution from anyone. The interests of all beneficiaries of such a trust are subject to the provisions of this subsection; however, the payments must be made from assets, property, or the proceeds of the assets or property, other than assets proscribed in s. 733.707(3), that are included in the settlor's gross estate for federal estate tax purposes.

(2) Unless a settlor provides by will, or designates in a trust described in s. 733.707(3) funds or property passing under the trust to be used as designated, the expenses of the administration and obligations of the settlor's estate must be paid from the trust in the following order:

(a) Property of the residue of the trust remaining after all distributions that are to be satisfied by reference to a specific property or type of property, fund, or sum.

(b) Property that is not to be distributed from specified or identified property or a specified or identified item of property.

(c) Property that is to be distributed from specified or identified property or a specified or identified item of property.

(3) Trust distributions that are to be satisfied from specified or identified property must be classed as distributions to be satisfied from the general assets of the trust and not otherwise disposed of in the trust instrument on the failure or insufficiency of funds or property from which payment should be made, to the extent of the insufficiency. Trust distributions given for valuable consideration abate with other distributions of the same class only to the extent of the excess over the value of the consideration until all others of the same class are exhausted. Except as provided in this section, trust distributions abate equally and ratably and without preference or priority between real and personal property. When a specified or identified item of property that has been designated for distribution in the trust instrument or that is charged with a distribution is sold or taken by the trustee, other beneficiaries shall contribute according to their respective interests to the beneficiary whose property has been sold or taken. Before distribution, the trustee shall determine the amounts of the respective contributions and such amounts must be paid or withheld before distribution is made.

(4) The trustee shall pay the expenses of trust administration, including compensation of trustees and attorneys of the trustees, before and in preference to the expenses of the administration and obligations of the settlor's estate.

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

History.— s. 5, ch. 2006-217; s. 6, ch. 2010-122.

736.0206 - Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.

(1) The court may review the propriety of the employment by a trustee of any person, including any attorney, auditor, investment adviser, or other specialized agent or assistant, and the reasonableness of any compensation paid to that person or to the trustee.

(2) If the settlor's estate is being probated, and the settlor's trust or the trustee of the settlor's trust is a beneficiary under the settlor's will, the trustee, any person employed by the trustee, or any interested person may have the propriety of employment and the reasonableness of the compensation of the trustee or any person employed by the trustee determined in the probate proceeding.

(3) The burden of proof of the propriety of the employment and the reasonableness of the compensation shall be on the trustee and the person employed by the trustee. Any person who is determined to have received excessive compensation from a trust for services rendered may be ordered to make appropriate refunds.

(4) Court proceedings to determine reasonable compensation of a trustee or any person employed by a trustee, if required, are a part of the trust administration process. The costs, including attorney's fees, of the person assuming the burden of proof of propriety of the employment and reasonableness of the compensation shall be determined by the court and paid from the assets of the trust unless the court finds the compensation paid or requested to be substantially unreasonable. The court shall direct from which part of the trust assets the compensation shall be paid.

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

(6) In a proceeding pursuant to subsection (2), the petitioner may serve formal notice as provided in the Florida Probate Rules, and such notice shall be sufficient for the court to acquire jurisdiction over the person receiving the notice to the extent of the person's interest in the trust.

History.— s. 2, ch. 2006-217; s. 3, ch. 2010-122.

736.1211 - Protections afforded to certain charitable trusts and organizations.

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

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

(3) A state agency or a local government may not require that the governing board or officers of a charitable organization, private foundation trust, split interest trust, or a private foundation as defined in s. 509(a) of the Internal Revenue Code include an individual or individuals of any particular race, religion, gender, national origin, socioeconomic status, age, ethnicity, disability, marital status, sexual orientation, or political party registration. Further, a state agency or a local government may not prohibit service as a board member or officer by an individual or individuals based upon their familial relationship to each other or to a donor or require that the governing board or officers include one or more individuals who do not share a familial relationship with each other or with a donor.

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

History.— s. 8, ch. 2010-122.

Note.— Section 9, ch. 2010-122, provides that “[s. 736.1211] does not invalidate contracts in effect before the effective date of this act.”

655.935 - Search procedure on death of lessee.

If satisfactory proof of the death of the lessee is presented, a lessor shall permit the person named in a court order for *that* purpose, or if no order has been served upon the lessor, the spouse, a parent, an adult descendant, or a person named as a personal representative in a copy of a purported will produced by such person, to open and examine the contents of a safe-deposit box leased or coleased by a decedent, or any documents delivered by a decedent for safekeeping, in the presence of an officer of the lessor.

- (1) If requested by such person, ***the lessor shall remove and deliver only:***
 - (a) Any writing purporting to be a will of the decedent, to the court having probate jurisdiction in the county in which the financial institution is located.
 - (b) Any writing purporting to be a deed to a burial plot or to give burial instructions, to the person making the request for a search.
 - (c) Any document purporting to be an insurance policy on the life of the decedent, to the beneficiary named therein.
- (2) ***The officer of the lessor shall make a complete copy of any document removed and delivered pursuant to this section and place that copy, together with a memorandum of delivery identifying the name of the officer, the person to whom the document was delivered, the purported relationship of the person to whom the document was delivered, and the date of delivery, in the safe-deposit box leased or coleased by the decedent.***
- (3) ***The lessor may charge reasonable fees to cover costs incurred pursuant to this section.***
- (4) Access granted pursuant to this section *is* not considered the initial opening of the safe-deposit box pursuant to s. 733.6065.

History.— s. 65, ch. 92-303; s. 1, ch. 2006-134; s. 67, ch. 2006-213; s. 2, ch. 2010-132.

731.110 - Caveat; proceedings.

(1) Any **interested person** who is apprehensive that an estate, either testate or intestate, will be administered or that a will may be admitted to probate without **that** person's knowledge may file a caveat with the court. **The caveat of the interested person, other than a creditor, may be filed before or after the death of the person for whom the estate will be, or is being, administered. The caveat of a creditor may be filed only after the person's death.**

(2) If the caveator is a **nonresident and is not represented by an attorney admitted to practice in this state who has signed the caveat**, the **caveator must designate** some person residing in the county **in which the caveat is filed** as the agent of the caveator, upon whom service may be made; **however, if the caveator is represented by an attorney admitted to practice in this state who has signed the caveat, it is not necessary to designate a resident agent.**

(3) **If** a caveat has been filed by an interested person other than a creditor, the court **may not** admit a will of the decedent to probate or appoint a personal representative until **formal notice** of the petition for administration has been served on the caveator or the caveator's designated agent and the caveator has had the opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules.

(4) **A caveat filed before the death of the person for whom the estate will be administered expires 2 years after filing.**

History.— s. 3, ch. 75-220; s. 2, ch. 77-87; s. 1, ch. 85-79; s. 2, ch. 92-200; s. 948, ch. 97-102; s. 9, ch. 2001-226; s. 2, ch. 2007-74; s. 3, ch. 2010-132.

731.201 - General definitions.

—
Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 736, 738, 739, and 744, the term:

...

(18) “Formal notice” means **a form of notice that is described in and served by a method of service provided under rule 5.040(a) of the Florida Probate Rules.**

...

(22) “Informal notice” or “notice” means **a method of service for pleadings or papers as provided under rule 5.040(b) of the Florida Probate Rules.**

...

History.— s. 1, ch. 74-106; s. 4, ch. 75-220; s. 1, ch. 77-174; s. 2, ch. 85-79; s. 66, ch. 87-226; s. 1, ch. 88-340; s. 7, ch. 93-257; s. 6, ch. 95-401; s. 949, ch. 97-102; s. 52, ch. 98-421; s. 11, ch. 2001-226; s. 106, ch. 2002-1; s. 2, ch. 2003-154; s. 2, ch. 2005-108; s. 29, ch. 2006-217; s. 3, ch. 2007-74; s. 8, ch. 2007-153; s. 1, ch. 2009-115; s. 4, ch. 2010-132.

Note.— Created from former s. 731.03.

731.301 - Notice.

—
(1) **If** notice to an interested person of a petition or other proceeding is required, the notice shall be given to the interested person or that person’s attorney as provided in **the code or** the Florida Probate Rules.

(2) **In a probate proceeding,** formal notice **is** sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person’s interest in the estate **or in the decedent’s protected homestead.**

(3) Persons given **proper** notice of a proceeding **are** bound by all orders entered in that proceeding.

History.— s. 1, ch. 74-106; s. 5, ch. 75-220; s. 3, ch. 77-87; s. 1, ch. 77-174; s. 1, ch. 93-257; s. 64, ch. 95-211; s. 950, ch. 97-102; s. 12, ch. 2001-226; s. 5, ch. 2010-132.

Note.— Created from former s. 732.28.

732.608 - Construction of terms.

—
The laws used to determine paternity and relationships for the purposes of intestate succession apply when determining whether class gift terminology and terms of relationship include adopted persons and persons born out of wedlock.

History.— s. 1, ch. 74-106; s. 38, ch. 75-220; s. 10, ch. 2010-132.

736.1102 - Construction of terms.

—
The laws used to determine paternity and relationships for the purposes of intestate succession apply when determining whether class gift terminology and terms of relationship include adopted persons and persons born out of wedlock.

History.— s. 11, ch. 2006-217; s. 17, ch. 2010-132.

733.2123 - Adjudication before issuance of letters.

—
A petitioner may serve formal notice of the petition for administration on interested persons. **A** person who is served with **such** notice **before** the issuance of letters or who has waived notice may **not** challenge the validity of the will, testacy of the decedent, qualifications of the personal representative, venue, or jurisdiction of the court, except in the proceedings before issuance of letters.

History.— s. 60, ch. 75-220; s. 2, ch. 81-27; s. 987, ch. 97-102; s. 96, ch. 2001-226; s. 14, ch. 2010-132.

732.2125 - Right of election; by whom exercisable.

—
The right of election may be exercised:

- (1) By the surviving spouse.
- (2) With approval of the court having jurisdiction of the probate proceeding by an attorney in fact or a guardian of the property of the surviving spouse. **Before approving the election**, the court shall determine **that** the election **is in** the best interests of the surviving spouse during the spouse's probable lifetime.

History.— s. 15, ch. 75-220; s. 12, ch. 99-343; s. 27, ch. 2001-226; s. 6, ch. 2010-132.
Note.—Former s. 732.210.