

Real Property, Probate and Trust Law Section of The Florida Bar

White Paper on

Proposed Revisions to Section 733.808(4) and Section 736.05053(1), Florida Statutes

I. SUMMARY

This proposed legislation is in response to the court opinion in *Morey v. Everbank*, 93 So. 3d 482 (Fla. 1st DCA 2012) (“*Morey*”). The proposed revisions to Sections 733.808(4) and 736.05053(1), Florida Statutes, are intended to be clarifying in nature and should apply retroactively. Life insurance proceeds are generally exempt from administration expenses and creditor claims under Sections 222.13 and 733.808, Florida Statutes. The proposed revisions clarify the circumstances under which this exemption is waived by the insured: In the case of insurance proceeds paid to a trustee of a revocable trust, the exemption is waived only if the trust instrument expressly provides that Section 733.808(4), Florida Statutes, does not apply.

II. CURRENT SITUATION

A. Statutory Background

Life insurance proceeds are generally exempt from administration expenses and the claims of creditors pursuant to Section 222.13(1), Florida Statutes. However, the exemption is lost if the insurance proceeds are paid to the insured or the insured’s estate. Section 222.13(1), Florida Statutes, provides, in relevant part:

. . . whenever the insurance, by designation or otherwise, is payable to the insured *or to the insured’s estate or to his or her executors, administrators, or assigns, the insurance proceeds shall become a part of the insured’s estate for all purposes* and shall be administered by the personal representative of the estate of the insured in accordance with the probate laws of the state in like manner as other assets of the insured’s estate. (*emphasis added*)

Section 733.808(1), Florida Statutes (titled “Death benefits; disposition of proceeds”) provides that death benefits of any kind, including life insurance proceeds, may be made payable to the trustee of an inter vivos trust. (While Section 733.808 applies to many types of death benefits, this discussion and the terminology used in this discussion are focused only on life insurance proceeds.) If the insurance proceeds are paid to a trustee of a trust, the statute provides that the insurance proceeds “shall be held and disposed of in accordance with the terms of the trust . . .” Section 733.808(2) provides for similar rules for insurance proceeds made payable to the trustee named in a last will that is admitted to probate.

Section 733.808(3), Florida Statutes, provides that if no trustee makes a valid claim for the insurance proceeds within 6 months, or if satisfactory evidence is furnished that there is no trustee to receive the proceeds, the insurance company shall pay the insurance proceeds to the “personal representative of the person making the designation, unless otherwise provided by an

agreement” between the insurance company and the insured (i.e., the alternative beneficiary on the designation form or a default beneficiary set forth in the insurance contract).

Section 733.808(4), Florida Statutes, provides that insurance proceeds paid to the trustee or to a default or alternate designee, other than the insured’s estate, are not subject to the claims of creditors or other expenses. Section 733.808(4) provides:

Death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent’s estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent’s estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust. (emphasis added)

B. Morey

In *Morey*, the insured designated his revocable trust as the beneficiary of a life insurance policy. After the insured’s death, the trustee filed a petition requesting a court determination that life insurance proceeds payable to the trust were exempt from all “death obligations” and, therefore, unavailable to the estate or the estate’s creditors.

The trust instrument in *Morey* directed the trustee to pay to the personal representative such amounts certified by the personal representative to be required to pay the settlor’s “death obligations,” including estate administration expenses, all the settlor’s enforceable debts, and all estate taxes. *Id.* at 484-85 (quoting Article V of the trust instrument).

The court focused on the language in Section 733.808(1), Florida Statutes, which provides that life insurance proceeds paid to a trustee “shall be *held and disposed of by the trustee in accordance with the terms of the trust ...*” The court concluded that the language of the trust together with the entire structure of the trust evidenced an “apparent intent and practical result” that would be the same if the life insurance proceeds were paid directly to the estate. *Id.* at 487. The court ruled that the settlor waived the statutory exemption in Section 222.13, Florida Statutes. *Id.* at 487.

The holding in *Morey* is contrary to the generally accepted interpretations of Sections 222.13(1) and 733.808(4). The generally accepted interpretations of these sections is that insurance proceeds payable to a trustee of a revocable trust are entitled to the statutory exemption from the claims of the creditors of the insured’s estate, notwithstanding any provision in the trust instrument directing the trustee to use trust assets to pay estate administration expenses or satisfy the claims of the creditors.

There is particular concern that the holding in *Morey* will be interpreted too broadly, and that the case will be construed to erode the long-standing (and until this case unchallenged)

understanding that Section 733.808(4) meant what it said, and that proceeds of insurance payable to a trust established by the insured are exempt from creditors claims.

III. EFFECT OF PROPOSED CHANGES GENERALLY

The effect of the legislative proposal is to clarify that a waiver of the statutory exemption from creditor's claims applicable to insurance proceeds paid to a trust established by the insured must be explicit. The waiver of the exemption cannot be inferred from general "pay all my debts"-type language in a trust instrument.

IV. SECTION BY SECTION ANALYSIS OF PROPOSED REVISIONS

The subcommittee suggests that the underlined language be added to Section 733.808(4), Florida Statutes, as follows:

Unless the trust agreement, declaration of trust or will expressly refers to this subsection and directs that it does not apply, death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent's estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust.

The proposed language clarifies that a general "pay all my debts"-type provision in a trust instrument does not waive the statutory exemption from creditor claims for insurance proceeds paid to a trustee. The proposed language prevents an unintentional waiver by providing that the statutory exemption may only be waived with trust language that specifically refers to Section 733.808(4), Florida Statutes.

Further, here are the subcommittee's proposed revisions to Section 736.05053(1):

. . . 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 assets or property that are included in the settlor's gross estate for federal estate tax purposes, and may not be made from, other than (a) assets proscribed in s. 733.707(3), and (b) death benefits payable as provided in s. 733.808(4), unless the trust instrument expressly refers to s. 733.808(4) and directs that it does not apply ~~that are included in the settlor's gross estate for federal estate tax purposes.~~

The proposed revisions insure that a trustee, in fulfilling its fiduciary responsibility to pay to the personal representative expenses of administration and obligations of the settlor's estate as provided in Section 736.05053, Florida Statutes, cannot use death benefits described in

733.808(1), (2), or (3), unless the settlor specifically waived the prohibition of the use of such benefits in accordance with 733.808(4). Here again, if the settlor wishes to waive the exemption, the waiver must be specific. A general “pay all my debts”-type waiver is not sufficient.

The legislative proposal is clarifying in nature and should apply retroactively. Before *Morey*, few thought that insurance proceeds to the insured’s revocable trust would expose the proceeds of insurance to creditor claims. Practitioners thought that Section 733.808(4), Florida Statutes, meant what it plainly said. Because the proposal is remedial, and clarifies and amplifies existing law, it has a retroactive effect, and will apply to all situations regardless of the date of the decedent’s death.

V. IMPACT ON STATE AND LOCAL GOVERNMENTS

None.

VI. DIRECT IMPACT ON PRIVATE SECTOR

The enactment of the legislative proposal will benefit the private sector by making certain litigation unnecessary in the wake of clarification of the issues addressed by the proposal.

VII. CONSTITUTIONAL ISSUES

None.

VIII. OTHER INTERESTED PARTIES

The Florida Bankers Association

The Business Law Section of The Florida Bar

5617999.00012-FL BAR COMM AD

WPB_ACTIVE 5598273.1

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Richard R. Gans, Chair, Joint Ad Hoc Committee on the *Morey* Case

Address 1515 Ringling Blvd., Tenth Floor, Sarasota, FL 34236
Telephone: (941) 957-1900

Position Type Joint Ad Hoc Committee on the *Morey* Case of the IRA, Insurance and Employee Benefits and Trust Law Committees of the Real Property Probate and Trust Law Section

CONTACTS

Board & Legislation Committee Appearance

Richard R. Gans, Ad Hoc Committee Chair, Ferguson Skipper Shaw Keyser Baron & Tirabassi, 1515 Ringling Blvd., Tenth Floor, Sarasota, FL 34236 Telephone: (941) 957-1900

William T. Hennessey, Chair, Legislation Committee, Probate Division, Real Property, Probate and Trust Law Section, Gunster Yoakley & Stewart, P.A., 777 Flagler Dr., S, Ste. 500E, West Palm Beach, FL 33401 (561-655-5677)

Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095 (850 222-3533)

Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095 (850 222-3533)

Appearances before Legislators

Meetings with Legislators/staff

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable,

List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication:

Support legislation which provides that a waiver of the statutory exemption from creditors' claims afforded to certain death benefits payable to trusts must be clear and specific, including amendments to F.S. 733.808(4) and F.S. 736.05053(1)

1 A bill to be entitled

2 An act relating to estates and trusts; amending s. 733.808,
3 F.S.; providing that a direction to apply certain death
4 benefits to pay claims and administration expenses must be
5 specific; amending 736.05053, F.S.; providing that a
6 direction to apply certain death benefits to pay claims and
7 administration expenses must be specific; providing that
8 the act is remedial in nature and intended to have
9 retroactive effect.

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

11 Section 1. Subsection (4) of section 733.0808, Florida
12 Statutes, is amended to read:

13 733.808 Death benefits; disposition of proceeds.-

14 (4) Unless the trust agreement, declaration of trust
15 or will expressly refers to this subsection and directs
16 that it does not apply, death benefits payable as provided
17 in subsection (1), subsection (2), or subsection (3),
18 unless paid to a personal representative under the
19 provisions of subsection (3), shall not be deemed to be
20 part of the decedent's estate, and shall not be subject to
21 any obligation to pay the expenses of the administration
22 and obligations of the decedent's estate or for
23 contribution required from a trust under s. 733.607(2) to
24 any greater extent than if the proceeds were payable
25 directly to the beneficiaries named in the trust.

26 Section 2. Subsection (1) of section 736.05053, Florida
27 Statutes, is amended to read:

28 736.05053 Trustee's duty to pay expenses and
29 obligations of settlor's estate.-

30 (1) A trustee of a trust described in s. 733.707(3)
31 shall pay to the personal representative of a settlor's

32 estate any amounts that the personal representative
33 certifies in writing to the trustee are required to pay the
34 expenses of the administration and obligations of the
35 settlor's estate. Payments made by a trustee, unless
36 otherwise provided in the trust instrument, must be charged
37 as expenses of the trust without a contribution from
38 anyone. The interests of all beneficiaries of such a trust
39 are subject to the provisions of this subsection; however
40 the payments must be made from assets, property, or the
41 proceeds of the assets or property that are included in the
42 settlor's gross estate for federal estate tax purposes, and
43 may not be made from, other than (a) assets proscribed in
44 s. 733.707(3), and (b) death benefits described in s.
45 733.808(4), unless the trust instrument expressly refers to
46 s. 733.808(4) and directs that it does not apply that are
47 included in the settlor's gross estate for federal estate
48 tax purposes.

49 Section 3. This act is intended to clarify existing law,
50 is remedial in nature, and has retroactive application
51 without regard to the date of the settlor's or decedent's
52 death.