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## **Florida Legislative Changes Impact Your Estate Plan**

On May 27, 2010, Governor Christ signed into law legislation designed to protect surviving Florida spouse's rights to an inheritance. The legislation comes at a time when many Florida resident estate plans contain provisions designed to eliminate, minimize or defer the payment of the federal estate tax.

These provisions are typically crafted in terms of a formula intended to produce the optimal result under the law prevailing at the time of application of the formula. The legislation is designed to eliminate the uncertainty created by federal estate tax law in 2010 and how to interpret the formulas.

### **Background:**

The failure of Congress in allowing the federal estate tax exemption to expire in 2010 has created chaos with many client estate plans. While the unlimited estate tax exemption has been a windfall for beneficiaries of wealthy individuals who pass away in 2010, it has also resulted in many marital trusts not being funded and spouse's being forced to rely on a trustee to maintain their standard of living.

While Congress continues to debate the issue, on May 27, 2010, Florida Governor Christ signed into law legislation designed to protect surviving Florida spouse's rights to an inheritance. The legislation comes at a time when many Florida resident estate plans contain provisions designed to eliminate, minimize or defer the payment of the federal estate tax.

These provisions are typically crafted in terms of a formula intended to produce the optimal result under the law prevailing at the time of application of the formula. The legislation is designed to eliminate the uncertainty created by the unlimited federal estate tax law in 2010 and how to interpret the formulas.

### **New Section 733.1051:**

The legislation creates new Section 733.1051 of the Florida Statutes. Section 733.1051 provides a Florida Probate court, upon application of a personal representative or a

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beneficiary of the estate, the ability to interpret the terms of a Last Will and Testament (“Will”) and the Federal Unified Tax Credit as if the decedent passed away in 2009. In interpreting the document court may consider the terms and purposes of the Will, the facts and circumstances surrounding the creation of the Will, and the testator’s probable intent.

**New Section 736.04114:**

The legislation also creates a new Section 736.04114 of the Florida Statutes, which provides a Florida Probate court, upon application of a trustee or any qualified beneficiary of the trust, with the ability to construe the terms of a Trust that is not then revocable to define the respective shares or determine beneficiaries in accordance with the intent of the settlor. Similar to the provisions contained in Section 733.1051, when interpreting the document a court may consider the terms and purposes of the Trust, the facts and circumstances surrounding the creation of the Trust, and the settlor’s probable intent.

**Legislative Intent:**

The legislation operates retroactively to estate and trust proceedings beginning January 1, 2010, and ending on December 31, 2010, or the earlier of the day before the date that a law having the effect of repealing or modifying s. 901 of the federal Economic Growth and Tax Relief Reconciliation Act of 2001 becomes effective. However, neither statutory provision will apply to a disposition that is specifically conditioned upon no federal estate or generation skipping transfer tax being imposed.

**Comment:**

As a result of the new sections added to the Florida Statutes, a surviving Florida spouse may elect to allow either the unlimited federal estate tax exemption (Florida has no state estate tax) or the new Florida law to dictate how a decedent’s estate planning formula is applied to their deceased spouse’s documents. Wealthy families may benefit from the unlimited amount of funds that can pass free of any federal estate tax to the next generation, either outright or in trust.

Alternatively, a surviving spouse could limit the federal estate tax exemption amount to \$3.5 million dollars and insure they have control over sufficient funds for the remainder of their life. Several practitioners have classified the new law as a type of “limited power of appointment” in that it provides a surviving spouse the ability to impact the amount of funds that will pass federal estate tax free to a decedent’s heirs in the present.