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****AS PASSED BY THE LEGISLATURE****
CHAPTER #: 2001-226, Laws of Florida

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIAL OVERSIGHT
FINAL ANALYSIS**

BILL #: CS/HB 137, 2nd Eng.

RELATING TO: Probate

SPONSOR(S): Council for Smarter Government; Representatives Goodlette and others

TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT YEAS 8 NAYS 0
 - (2) BANKING YEAS 8 NAYS 0
 - (3) COUNCIL FOR SMARTER GOVERNMENT YEAS 10 NAYS 0
 - (4)
 - (5)
-

I. SUMMARY:

Primarily, this act contains numerous grammar and style changes to the Florida Probate Code, proposed by the Probate Law Committee of the Real Property, Probate and Trust Law Section, of the Florida Bar. Significant changes include:

- Removing court procedure from the statutes.
- Providing that the effect of judgment of adoption is controlled by the Probate Code, not the adoption statutes.
- Integrating the Medicaid claims system into the present system of dealing with claims in the estate, and providing that a Medicaid claim may be amended up to one year after death of the decedent.
- Separating notice to creditors from the notice of administration provided to beneficiaries.
- Clarifying the grounds for removal of a personal representative, and providing specific procedures for replacing a personal representative upon death, resignation, or removal.
- Changing and simplifying the method for opening of a safety deposit box.
- Eliminating family administration, and increasing the jurisdictional amount for summary administration from \$25,000 to \$75,000.
- Increasing the family allowance from \$6,000 to \$18,000.
- Fixing the elective share provisions changed in a previous session, before the changes go into effect this October.

This act does not appear to have a significant fiscal impact on state or local government.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

The Probate Code specifies the manner of distribution of the assets owned by deceased persons, and the payment of their obligations. The Probate Law Committee, a subcommittee of the Real Property, Probate, and Trust Law Section of the Florida Bar, prepared the initial draft of these revisions. That subcommittee summarized the project as follows:

These proposals for changes are the result of three years work by more than a hundred experienced probate lawyers, including probate judges. Those lawyers and judges are members of the Probate Law Committee of this Section and are members of the various local subcommittees of that Committee. This represents the most comprehensive overhaul of the probate code since it became law on January 1, 1976. Some of the changes are grammatical only to make the statute more readable. Others are changes of substance that will change rights and the procedures for enforcement of those rights.¹

See "Section-by-Section Analysis" for a detailed explanation of the Present Situation applicable to each of the sections of the act.

C. EFFECT OF PROPOSED CHANGES:

See "Section-by-Section Analysis".

D. SECTION-BY-SECTION ANALYSIS:

**Chapter 63, F.S.
Adoption**

Section 1 -- Amends s. 63.172, F.S., regarding effect of judgment of adoption.

¹ <http://www.flabarrpntl.org/probaterevs.html>. Rohan Kelley, a frequent contributor to the legislative process regarding the Probate Code and the author of numerous articles and treatises regarding the Florida Probate Code, organized the Probate Law Committee. The legislative committee chair for the Real Property, Probate, and Trust Law Section of the Florida Bar is Laird Lile, a practicing attorney. Lobbyist for the Section is Pete Dunbar, a former House member. References to the "bill proponents" in this analysis refer to the Probate Law Committee.

Present Situation: Section 63.172, F.S., provides that a judgment of adoption terminates all legal relationships between the adopted person and the former relatives, and provides that the adopted person shall be a lineal descendent of the adopting parent as if born to the adopting parent. Section 732.108, F.S., provides that, in general, intestate succession by or from an adopted person is as if the adopted person is a lineal descendant of the adopting parent and is one of the natural kindred of all members of the adopting parent's family, and is not a lineal descendant of his or her natural parents, nor is he or she one of the kindred of any member of the natural parent's family or any prior adoptive parent's family. Up to this point, s. 732.108, F.S., is consistent with s. 63.172, F.S. Section 732.108, F.S., however, has three exceptions to the general rule:

(a) Adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and the natural parent or the natural parent's family.

(b) Adoption of a child by a natural parent's spouse who married the natural parent after the death of the other natural parent has no effect on the relationship between the child and the family of the deceased natural parent.

(c) Adoption of a child by a close relative, as defined in s. 63.172(2), has no effect on the relationship between the child and the families of the deceased natural parents.

The statutes are thus in conflict.²

Effect of Proposed Changes: Reconciles the conflicting statutes by providing that the rights of adopted persons to inherit from the former family are as set forth in the Probate Code.

Chapter 409 Social and Economic Assistance

Section 2 -- Amends s. 409.9101, F.S., regarding recovery for payments made on behalf of Medicaid-eligible persons.

Present Situation: Chapter 409, F.S., contains Florida law relating to the Medicaid program, which is administered by the Agency for Health Care Administration (AHCA). Section 409.9101, F.S., entitled the "Medicaid Estate Recovery Act", requires the state Medicaid program to seek recovery from estates for the cost of Medicaid services provided to certain individuals. 42 U.S.C. § 1396p(b) requires states participating in Medicaid to establish a Medicaid recovery plan. In fiscal year 1999-2000, the state recovered \$10.2 million dollars pursuant to s. 409.9101, F.S.³

Section 409.9101(3), F.S., requires the personal representative of every estate to serve a copy of the notice of administration on ACHA.

Effect of Proposed Changes: Deletes subsection (3). New s. 733.2121, created by this act, provides the requirements for notice to creditors of an estate.

Present Situation: Section 409.9101(4), F.S., provides that the acceptance of public medical assistance through Medicaid creates a claim against the estate in favor of AHCA of the total amount

² A typical example would be: John, an only child, and Alice have a son named Adam. John dies, Alice remarries, and her new husband adopts Adam. Sometime later, John's parents die intestate. Assume that, under the laws of intestacy, Adam is the sole heir to John's parents' estate but for the adoption. Under s. 63.172, F.S., the adoption has terminated the legal rights, and thus Adam receives nothing; but under s. 732.108(1)(b), F.S., Adam is entitled to the intestate estate of John's parents. The sections are in conflict.

³ Memorandum from Wavene Poole, of AHCA, undated but received January 4, 2001.

paid to or for the benefit of the Medicaid recipient for medical assistance after he or she reached 55 years of age.

Effect of Proposed Changes: Changes “claim” to “debt” to conform to federal Medicaid law. Specifies that payment of benefits to a person under 55 years of age does not create a debt under this section. Specifies that, upon a filing of a statement of claim, ACHA is an “interested person”.⁴ Also, grammar and style changes are made.

Present Situation: Section 409.9101(5), F.S., provides that, at the time of filing the claim, ACHA may reserve the right to amend the claim based on medical claims submitted by providers subsequent to AHCA’s initial claim calculation. Medical providers have one year from the time of providing service to file a claim for reimbursement.⁵

Section 733.702, F.S., provides that the general claims period for filing a claim in a probate case is 3 months from the date of first publication of the notice of administration.⁶ A claim may be amended as a matter of right within that 3 month period. This time period can expire before the one year deadline for providers to bill Medicaid.

Section 409.910, F.S., provides that the Medicaid program has a right to reimbursement when a third party is found negligent for the accident or injury that led to the need for medical services. Two appellate decisions in cases where the injured party died from their injuries, and thus estates were opened, give conflicting guidance on how Medicaid liens will be treated in a probate case. In both cases, the estates moved to set aside the AHCA claim as untimely. One district court of appeal held that the 3 month limitation is absolute, refusing to allow an amended claim that was filed in the probate proceeding 2 days beyond the deadline;⁷ the other held that the filing of a lien in the public records was sufficient to constitute a claim in the probate case, thereby requiring payment of a claim that was never filed in the probate case.⁸

Effect of Proposed Changes: Provides that ACHA may amend a timely filed claim as a matter of right up to one year after the last date medical services were provided to the decedent.

Present Situation: Section 409.9101(6), F.S., provides that ACHA is to base its claim on the current total allowable amount of Medicaid payments as denoted in the agency’s provider payment processing system at the time the agency’s claim or amendment is filed. The agency’s provider processing system reports are be admissible as prima facie evidence in substantiating the agency’s claim.

⁴ “Interested person” is a defined term in the Probate Code. Section 731.201(21), F.S. Classification as an interested person entitles a person to notice of important stages of the probate proceeding.

⁵ 42 U.S.C. § 1395f(a)(1) provides that a Medicaid provider shall have up to the end of the 3rd calendar year to present a claim for reimbursement, but that the Secretary of the Department of Health and Human Services may reduce the time period for presenting a claim to no less than 1 year. Although it is widely asserted that the one year limit applies in Florida, *see, e.g., Shearer v. Agency for Health Care Administration*, 737 So.2d 1229, 1230, the only mention of the limit found in Florida law is a repealed section of the Florida Administrative Code. *See*, F.A.C. 59G-5.090, repealed effective May 8, 1997.

⁶ Current law requires that a copy of the “notice of administration” be furnished to known or reasonably ascertainable creditors. Other sections of this bill split the notice of administration into a notice of administration that is furnished to beneficiaries, and a notice to creditors that is furnished to known or reasonably ascertainable creditors.

⁷ *Estate of Shearer v. Agency for Health Care Administration*, 737 So.2d 1229 (Fla. 5th DCA 1999) (refusing to allow amendment of claim from \$28,209.14 to \$108,088.55, thereby costing the state \$79,879.41).

⁸ *Agency for Health Care Administration v. Estate of Johnson*, 743 So.2d 83 (Fla. 3rd DCA 1999) (requiring estate to pay amended claim of \$697,356.89 to the state).

Effect of Proposed Changes: Deletes the requirement that ACHA base its claim on the current total allowable amount of Medicaid payments as denoted in the agency's provider payment processing system at the time the agency's claim or amendment is filed.

Present Situation: A claim of ACHA under s. 409.9101, F.S., is a Class 3 claim. Section 733.707(1), F.S., provides a classification system for claims, whereby all claims in a class must be paid before any claim in the following class or classes may be paid.

Effect of Proposed Changes: Deletes the provision in s. 409.9101, F.S., that a Medicaid reimbursement claim is a Class 3 claim. Section 733.707(1), F.S., as amended by this act, provides that a claim under s. 409.9101, F.S., is a Class 3 claim.

Present Situation: Section 409.9101(9), F.S., provides that a claim under s. 409.9101, F.S., may not be enforced against any property that is determined to be the homestead of the deceased Medicaid recipient and is determined to be exempt from the claims of creditors of the deceased Medicaid recipient. Section 4, Art. X of the State Constitution, provides the constitutional homestead exemption; however, numerous statutes provide that property beyond the constitutional minimum is exempt from the claims of creditors in estate proceedings.⁹

Effect of Proposed Changes: Expands the property exempt from a claim under s. 409.9101, F.S., from the constitutional minimum to all property "exempt from the claims of creditors under the Constitution or laws of Florida". Conforming changes are made to subsection (12).

Chapter 655, F.S. Financial Institutions Generally

Section 3 -- Amends s. 655.936 F.S., regarding safe-deposit boxes.

Present Situation: Section 655.936(4), F.S., provides that an employee of the financial institution and the personal representative must conduct the opening of a safe-deposit box owned by a decedent. They both must prepare and sign an inventory of the box contents, which inventory must be filed with the probate court within 10 days. Section 733.604(1), F.S., provides that only certain persons may view a filed inventory.

Effect of Proposed Changes: Modifies the procedure for the initial opening of a decedent's safe-deposit box to provide that it must be conducted according to the provisions of new s. 733.6065, F.S.

Chapter 731, F.S. Probate Code: General Provisions

Section 4 -- Amends s. 731.005, F.S., regarding the short title of the Florida Probate Code, making grammar changes only.

Section 5 -- Amends s. 731.011, F.S., regarding determination of substantive rights; procedures.

Present Situation: Section 731.011, F.S., provides an effective date for incorporation of the 1976 changes to the Probate Code; and provides that the procedures for enforcement of rights set forth

⁹ For example, the constitutional homestead protection for personal property is \$1,000. Section 732.402(2)(a), F.S., provides that the surviving spouse, or the children of the decedent, are entitled to the following property notwithstanding creditor claims (other than perfected security interests): Household furniture, furnishings, and appliances up to a value of \$10,000, and all automobiles in the decedent's name and regularly used by the decedent or members of the decedent's immediate family.

in the Probate Code are set forth in the Probate Code. Article V, s. 2, of the Florida Constitution, provides that the “supreme court shall adopt rules for the practice and procedure in all courts”. In 1984, the Florida Supreme Court directed the Probate and Guardianship Rules Committee to study the Florida Statutes, and to write into the Probate Rules those matters of procedure contained in the Probate Code.¹⁰ In 1988, that committee wrote:

The committee, through the proper channels in The Florida Bar (initially, the Probate Law Committee of the Real Property, Probate and Trust Law Section), intends to ask the legislature to repeal those portions of the statutes that are procedural when there are similar rules already in place, or when similar new rules are added by this opinion. It is the opinion of the committee that continuing to maintain procedure in the statutes when there is a rule specifying that procedure is detrimental to the orderly process of the court and the public that it serves, especially when, over time, the statute and the rule may diverge.¹¹

Effect of Proposed Changes: Recognizes that the procedures for enforcement of rights set forth in the Probate Code are set forth in the Florida Probate Rules. Also, recognizes the Probate Rules as the rules of procedure in probate matters, in compliance with art. V., s. 2, of the Florida Constitution. Also, makes grammar and style changes.

Section 6 -- Amends s. 731.104, F.S., regarding verification of documents.

Present Situation: Section 731.104, F.S., provides a form for use in verification of documents required to be verified by the Probate Code or the Probate Rules.

Effect of Proposed Changes: Removes the form of verification from the statute, and replaces it with a reference to the Probate Rules.¹² Also, grammar and style changes are made.

Section 7 -- Amends s. 731.106, F.S., regarding assets of nondomiciliaries, making grammar and style changes only.

Section 8 -- Repeals s. 731.107, F.S., regarding adversary proceedings.

Present Situation: Section 731.107, F.S., provides the Rules of Civil Procedure govern procedure in adversary matters in probate.

Effect of Proposed Changes: Deletes s. 731.107, F.S., as unnecessary. This is a rule of procedure, and is presently covered by Probate Rule 5.025(d)(2).

Section 9 -- Amends s. 731.110, F.S., regarding caveats.

Present Situation: A caveat is a request made by an interested person, filed with the clerk of the court, that the interested person be notified if a probate case is filed regarding the deceased person named in the caveat. A caveat must state the name of the deceased person, and must also contain the decedent’s social security number or date of birth, if known. A caveat filed by an individual or company not domiciled in the county where the caveat is filed must also provide the name and residence address of a resident of the county who may be formally served with the notice of administration.

¹⁰ *The Florida Bar Re Emergency Amendments To Florida Rules Of Probate And Guardianship Procedure*, 460 So.2d 906, (Fla. 1984).

¹¹ *The Florida Bar*, 537 So.2d 500, 501 (Fla. 1988).

¹² The form for verification is presently provided in rule 5.020(e)

Effect of Proposed Changes: Adds, in addition to requiring the decedent's social security number or date of birth, that a caveat must list the decedent's last known residence address, if known, as identifying information. Additionally, if a member of the Florida Bar is named as the resident of the county upon whom notice may be served, the attorney may list an office address in lieu of a residence address.

Section 10 -- Repeals s. 731.111, F.S., regarding notice to creditors.

Present Situation: Section 731.111(1), F.S., provides for publication of a notice to creditors. Section 731.111(2), F.S., provides specific notice requirements related to the Florida Department of Revenue.

Effect of Proposed Changes: Repeals s. 731.111, F.S. Subsection (1) is procedural in nature, and is generally covered by Probate Rule 5.240. Subsection (2) is moved to s. 733.702(5), F.S.

Section 11 -- Amends s. 731.201, F.S., regarding definitions applicable to the Probate Code. Numerous grammar and style changes are made to definitions. The definitions are made applicable to s. 409.9101, F.S. (the Medicaid Estate Recovery Act). The substantive changes to definitions are as follows:

Present Situation: Section 731.201(1), F.S., defines "authenticated" by reference to 28 U.S.C. § 1733 (Government records and papers) or 28 U.S.C. § 1741 (Foreign official documents). Those statutes, however, do not define what an "authenticated" document is. Rule 44 of the Federal Rules of Civil Procedure, entitled "Proof of Official Record", references authenticated documents. Authenticated documents are used in probate proceedings in regards to documents from other states or countries that are filed in the probate proceeding.

Effect of Proposed Changes: Deletes the references to specific federal statutes, and replaces them with a general reference to the Federal Rules of Civil Procedure.

Present Situation: Section 731.201(8), F.S., defines "devise" to mean a testamentary disposition of real or personal property by will. Section 731.201(9), F.S., defines "devisee" to mean a person designated by a will to receive a devise. Section 731.201(10), F.S., defines "distributee" to mean a person who has received estate property from a personal representative other than as a creditor or purchaser. Increasingly, estate planners are using trusts that include a testamentary disposition as an estate planning tool partially or completely in lieu of a will.

Effect of Proposed Changes: Makes the definitions of "devise", "devisee", and "distributee", also applicable to a trust that has a testamentary disposition.

Present Situation: Sections 731.201(16), and 731.201(20), F.S., refer to s. 731.301, F.S., which outlines the procedures for giving of notice in probate cases.

Effect of Proposed Changes: Replaces the references to s. 731.301, F.S., with reference to the Probate Rules. Section 731.301, F.S., is amended to delete procedure in deference to the Probate Rules.

Present Situation: “Protected homestead” is not defined in the Probate Code. Art. X, s. 4(a)(1), of the Florida Constitution, provides a homestead exemption¹³ for a person’s home which provides that the home is exempt from forced sale under process of any court (with certain exceptions and limitations).¹⁴ Art. X, s. 4(b), of the Florida Constitution, provides that this homestead exemption benefits a surviving spouse or heirs of the owner.

Property owned as tenants by the entirety is a “tenancy which is created between a husband and wife and by which together they hold title to the whole with right of survivorship so that . . . [i]t is inherited by the survivor of the two.”¹⁵ Title to a homestead owned by a husband and wife is held as a tenancy by the entireties, but other property may also be held by a husband and wife as a tenancy by the entireties.

Effect of Proposed Changes: Defines the term “protected homestead” to mean the property described in art. X, s. 4(a)(1), of the Florida Constitution. Real property owned as tenants by the entireties is not a protected homestead.

Section 12 -- Amends 731.301, F.S., regarding notice to interested persons.

Present Situation: Throughout the Probate Code, interested persons are required to be provided notice of various probate court filings. There are two types of notice, the procedures for giving “formal notice” and “informal notice” to an interested person are set forth in s. 731.301, F.S. The types and methods of notice are also found at Probate Rule 5.040.

Effect of Proposed Changes: Eliminates procedures for formal and informal notice, and refers to the Probate Rules to define the types and methods of notice.

Section 13 -- Amends s. 731.303, F.S., regarding representation in proceedings involving estates of decedents or trusts.

Present Situation: Section 731.303(1), requires that certain information be included in pleadings which affect certain interests.

Effect of Proposed Changes: Deletes subsection (1) as procedural. Also, grammar and style changes are made.

¹³ The phrase “homestead exemption” is also commonly used to describe the \$25,000 deduction from the value of a home used in calculating the taxable value of a personal residence. That homestead exemption is not affected by, nor is it applicable to, the homestead exemption in this section.

¹⁴ SECTION 4. Homestead; exemptions.—

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

¹⁵ Black’s Law Dictionary, 6th ed., at 1465.

Part I of Chapter 732 Intestate Succession

Section 14 -- Amends s. 732.101, F.S., regarding intestate estate. The laws on intestate succession govern how property is distributed among heirs when the decedent dies without leaving a valid will.

Present Situation: Section 732.101(2), F.S., provides that the death of the decedent is the event that vests the heirs' right to property.

Effect of Proposed Changes: Clarifies that the vesting applies to the heirs' right to *the decedent's* property.

Section 15 -- Amends s. 732.102, F.S., regarding intestate share of other heirs.

Present Situation: If there is no surviving lineal descendant (no children) of the decedent, the spouse inherits the entire estate. If there are surviving lineal descendants, all of whom are lineal descendants of the surviving spouse, then the spouse receives the first \$20,000 of the intestate estate, plus one-half of the balance of the intestate estate. Valuation is calculated on fair market value on the date of the decedent's death.

Effect of Proposed Changes: Increases the \$20,000 sum to \$60,000 to account for inflation.¹⁶ Additionally, the date for valuation is changed to the date of distribution. Also, grammar and style changes are made, and the section is more logically numbered.

Section 16 -- Amends s. 732.103, F.S., regarding the intestate share of heirs, making grammar and style changes only.

Section 17 -- Amends s. 732.107, F.S., regarding escheat.

Present Situation: The law on escheat governs the disposition of property of a decedent when no lawful heir exists to claim the property. Escheat property is turned over to the State. A lawful heir may claim the escheated property within ten years of when the letters of administration were entered, and is entitled to interest at the same rate as a judgment. A personal representative who believes that property of an estate may escheat to the state, or who is in doubt as to who is the lawful beneficiary of estate property, is required to institute a proceeding to determine beneficiaries within one year of when the letters of administration are entered. The Department of Legal Affairs must be served a copy of the petition to determine heirs. If a personal representative fails to timely file a petition to determine heirs, the Department of Legal Affairs may do so. The clerks of court are required to annually furnish a list to the Department of Legal Affairs of all estates being administered in which no person appears to be entitled to the property and in which the personal representative has not filed a petition to determine heirs. Probate Rule 5.386 contains much of the same language.

Effect of Proposed Changes: Removes procedural matters that are covered by Probate Rule 5.386. The start of the ten year period is changed to the date on which the escheated funds are paid to the State Treasurer.¹⁷ Removes the requirement that the State School Fund pay interest

¹⁶ According to a calculation by the American Institute for Economic Research, using the Consumer Price Index calculated by the United States of America, Bureau of Labor Statistics, \$20,000 in 1974 equals \$60,316 in 2000. <http://www.aier.org>. The figure is rounded for ease in use and practice.

¹⁷ Utilizing this date as a starting point is intended to make administration significantly easier, according to the comments by Probate Code Committee of September 17, 2000.

on the funds. Provides that a certified public accountant can additionally file an application for abandoned property on behalf of a client. Also, grammar and style changes are made.

Section 18 -- Amends s. 732.1101, F.S., regarding aliens, making grammar and style changes only.

Part II of Chapter 732, F.S. Elective Share of Surviving Spouse

Current law gives a surviving spouse (or guardian of the property) the right to file for an elective share of their spouse's estate. The elective share equals thirty percent of the fair market value of all the decedent's property that is subject to administration, except property not located in Florida, and excluding: homestead; household furniture, furnishings, and appliances up to \$10,000; automobiles held in the decedent's name; Florida Prepaid College Program; and family allowances. The current elective share law also does not consider: the duration of marriage; nonprobable assets; the economic contribution made by the parties to the marriage; or transfers of the decedent's property to many inter vivos trusts. A decedent may effectively disinherit a surviving spouse by placing his or her assets into an inter vivos trust having testamentary disposition.

Chapter 99-343, L.O.F., scheduled to go into effect on October 1, 2001, substantially modifies the elective share provisions of the Probate Code. That act provides that a spouse has the right to claim an elective share of the "elective estate" instead of the estate "subject to administration". The "elective estate" is broader and encompasses both probatable assets and nonprobatable assets including any revocable inter vivos trusts. This prevents the decedent from disinheriting the surviving spouse via a revocable inter vivos trust, absent a written agreement between the parties that the surviving spouse will waive his or her elective share. That act excludes from the elective estate: irrevocable transfers by the decedent; transfers in which the decedent received adequate consideration; transfers made with the surviving spouse's consent; proceeds of any life insurance; one-half of the property to which ss. 732.216-.228, F.S., apply and property held in a qualifying special needs trust. This act also provides for valuation of certain properties, including the special needs trust; all other properties are to be computed at fair market value.

While the categories of assets subject to the spousal election are expanded by ch. 99-343, L.O.F., the current thirty percent election percentage remains the same. Once the amount is determined, the share is satisfied in the following order of priority: from property interests that pass outright to the spouse, or that pass in trust for the surviving spouse; from the decedent's probate estate; from property held in the decedent's revocable trust; and finally from other recipients of the elective share property. If property from the elective estate is sold prior to distributing the elective share, the beneficiary is liable to the estate for that amount, not the bona fide purchaser. The court must determine the amount of elective share and order its payment.¹⁸

The "Present Situation" described in the elective share portions of this analysis refers to the state of the law as it will be upon October 1, 2001, the effective date of ch. 99-343, L.O.F.

Section 19 – Amends s. 732.2025, F.S., effective October 1, 2001, regarding definitions used in ss. 732.2025-732.2155, F.S., the Elective Share provisions of the Probate Code.

Present Situation: Section 732.2025(8), F.S., defines "qualifying special needs trust" or "supplemental needs trust" as a trust established for an ill or disabled surviving spouse with court approval before or after a decedent's death for such incapacitated surviving spouse, if, commencing

¹⁸ From House Of Representatives, As Revised By The Committee On Real Property And Probate, Final Analysis, July 22, 1999.

on the decedent's death: (a) The income and principal are distributable to or for the benefit of the spouse for life in the discretion of one or more trustees less than half of whom are ineligible family trustees. For purposes of this paragraph, ineligible family trustees include the decedent's grandparents and any descendants of the decedent's grandparents who are not also descendants of the surviving spouse; and (b) During the spouse's life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse. (c) The requirement for court approval and the limitation on ineligible family trustees does not apply if the aggregate of the trust property as of the applicable valuation date in a qualifying special needs trust is less than \$100,000.

Effect of Proposed Changes: Deletes the term "ill"; deletes the exception regarding ineligible family trustees; clarifies that the \$100,000 is the aggregate total of the assets in all trusts established by a decedent; and specifies that value is determined on the applicable valuation date defined at s. 732.2095(1)(a), F.S.

Section 20 -- Amends s. 732.2035, F.S., effective October 1, 2001, regarding property entering into the elective estate.

Present Situation: Section 732.2035(2), F.S., provides that property included when calculating the amount of the elective estate includes the decedent's ownership interest in accounts or securities registered in "Pay On Death," "Transfer On Death," "In Trust For," or coownership with right of survivorship form. For this purpose, "decedent's ownership interest" means that portion of the accounts or securities which the decedent had, immediately before death, the right to withdraw or use without the duty to account to any person.

Effect of Proposed Changes: Provides that, in the case of accounts or securities held in tenancy by the entirety, only one half of the value the account or security is used in calculating the amount of the elective estate.

Present Situation: Section 732.2035(5)(a), F.S., provides that property included when calculating the elective estate includes certain property transferred by the decedent to the extent that at the time of the decedent's death the decedent possessed the right to, or in fact enjoyed the possession or use of, the income or principal of the property; or the principal of the property could, in the discretion of any person other than the spouse of the decedent, be distributed or appointed to or for the benefit of the decedent. A right to payments from an annuity or under a similar contractual arrangement is treated as a right to that portion of the income of the property necessary to equal the annuity or other contractual payment.

Effect of Proposed Changes: Additionally, a right to payments under an annuity, an annuity trust, or a unitrust, or a similar arrangement is treated as a right to that portion of the income of the property necessary to equal the annuity or other contractual payment. An "annuity trust" is "a form of trust calling for payment of a fixed amount of income regardless of the amount of principal." A "unitrust" is a "trust from which a fixed percentage of the net fair market value of the trust's assets, valued annually, is paid each year to the beneficiary."

Section 21 -- Amends s. 732.2045, F.S., effective October 1, 2001, regarding exclusions from elective estate.

Present Situation: Section 732.2045(1), F.S., lists 8 types of property that are excluded when calculating the elective estate.

Effect of Proposed Changes: Adds “property which constitutes the protected homestead of the decedent whether held by the decedent or by a trust at the decedent’s death” as a type of property excluded when calculating the elective estate. This change removes a decedent’s homestead from the elective estate, provided the homestead is titled either in the decedent’s name or is held by the decedent’s revocable trust. A home titled as tenants by the entireties will be included at half value and that half will count against the spouse’s elective share right. A spouse’s life estate interest in the homestead will not satisfy any of the elective share right since only property interests included in the elective estate count against the spouse elective share amount.

Section 22 -- Amends s. 732.2055, F.S., effective October 1, 2001, regarding valuation of the elective estate.

Present Situation: Section 732.2055, F.S., defines the “value” of property for purposes of calculating the total value of the elective estate. Subsection (5) provides the general rule on valuation of property, providing that the fair market value of the property on the date of the decedent’s death is the measure of value, minus claims other than funeral expenses that are payable from the elective estate, and minus mortgages and liens encumbering property.

Effect of Proposed Changes: Removes the exception for funeral expenses, thus providing that funeral expenses are deducted from the gross value of the property in calculating the net value of the elective estate.

Section 23 -- Amends s. 732.2075, F.S., effective October 1, 2001, regarding sources from which the elective estate is payable.

Present Situation: Should the surviving spouse make the election to take the elective share, section 732.2075, F.S., provides for the payment of the elective share. Subsection (1) lists property in the possession of the surviving spouse, the value of which is credited against the elective share. If the elective share is not fully paid under subsection (1), subsection (2) provides for the order in which the assets that make up the elective estate are apportioned to satisfy payment of the elective share. There are three classes of property from which the elective share is payable, which are:

Class 1.-- The decedent's probate estate and revocable trusts.

Class 2.-- Recipients of property interests included in the elective estate under s. 732.2035(2), (3), or (6), F.S., and, to the extent the decedent had at the time of death the power to designate the recipient of the property, property interests included under s. 732.2035(5) and (7), F.S.

Class 3.-- Recipients of all other property interests included in the elective estate except interests for which a charitable deduction with respect to the transfer of the property was allowed or allowable to the decedent or the decedent’s spouse under the United States gift tax laws.

Effect of Proposed Changes: Provides that “protected charitable interests” are not deemed “recipients” of property under Class 2 or Class 3. Adds a new Class 4, which class includes “recipients of protected charitable lead interests, but only to the extent and at such times that contribution is permitted without disqualifying the charitable interest in that property for a deduction under the United States gift tax laws.”

Additionally, two definitions applicable only to the four classes are added. This act defines a “protected charitable interest” as “any interest for which a charitable deduction with respect to the transfer of the property was allowed or allowable to the decedent or the decedent's

spouse under the United States gift tax laws"; and defines a "protected charitable lead interest" as "a protected charitable interest where one or more deductible interests in charity precede some other nondeductible interest or interests in the property."

Section 24 -- Amends s. 732.2085, F.S., effective October 1, 2001, regarding liability of direct recipients and beneficiaries.

Present Situation: Section 732.2085, F.S., provides for the liability of direct recipients and beneficiaries of property subject to the elective share.

Effect of Proposed Changes: Adds a conforming cross-reference necessary because of the change to s. 732.2055(5), F.S.

Section 25 -- Amends s. 732.2095, F.S., effective October 1, 2001, regarding liability of direct recipients and beneficiaries.

Present Situation: Section 732.2095(1)(a), F.S., defines the "applicable valuation date" for different forms of property subject to the elective share. The applicable valuation date under s. 732.2095(1)(a)6., F.S., is the date of the decedent's death.

Effect of Proposed Changes: Provides that applicable valuation date of value on the date of the decedent's death is applicable to property under s. 732.2035(2), F.S. (pay on death accounts or securities), and is not applicable to property under s. 732.2035(4), F.S. (transfer of certain property to a revocable trust).

Present Situation: Section 732.2095(2)(c), F.S., provides that if the spouse is a beneficiary of a qualifying special needs trust, the principal value of the trust is used in calculating the elective estate and elective share. Section 732.2095(2)(d), F.S., provides that if the spouse is the beneficiary of a trust that does not meet the requirements of an elective share trust, the value of the interest in the trust is the transfer tax value of the interest. A qualifying special needs trust may qualify under both, with different results.

Effect of Proposed Changes: Provides that a qualifying special needs trust is valued under paragraph (c), not paragraph (d).

Section 26 -- Amends s. 732.2105, F.S., effective October 1, 2001, regarding effect of elective share election on other interests.

Present Situation: Section 732.2105(2), F.S., provides that, if the elective share election is made, the balance of the estate, after payment of the elective share, is administered as though the surviving spouse had predeceased the decedent.

Effect of Proposed Changes: Deletes subsection (2) as unnecessary.

Section 27 -- Amends s. 732.2125, F.S., effective October 1, 2001, regarding right of election; by whom exercisable, making grammar and style changes only.

Section 28 -- Amends s. 732.2135, F.S., effective October 1, 2001, regarding time of election; extensions; withdrawal.

Present Situation: The elective share is the right of a surviving spouse to a minimum share of their deceased spouse's estate. A spouse who files an election to take the elective share foregoes

the inheritance in the will, and takes the elective share instead. An election to take the elective share must be filed by the earlier of 6 months after the date of publication of the notice of administration, or 2 years after the death of the decedent.

Effect of Proposed Changes: Eliminates the reference to the date of first publication of the notice of administration, and provides that the election to take the elective share must be filed by the earlier of 6 months after the notice of administration is served on the surviving spouse or on a legal representative of the surviving spouse, or 2 years after the death of the decedent. This change conforms to other changes in this act that eliminates publication of the notice of administration. Also, grammar and style changes are made.

Section 29 -- Amends s. 732.2145, F.S., effective October 1, 2001, regarding order of contribution and the personal representative's duty to collect contribution; making grammar and style changes only.

Section 30 -- Amends s. 732.2155, F.S., effective October 1, 2001, regarding effective date; effect of prior waivers; and transition rules regarding the elective share.

Present Situation: Section 732.2155, F.S., provides for the effective date of the elective share changes made by ch. 99-343, L.O.F., and for the transition of old law to new.

Effect of Proposed Changes: Adds subsection (6) to s. 732.2155, F.S., to provide that the elective share changes embodied in ch. 99-343, L.O.F., and in this act, to do not affect any interest in property held, as of the decedent's death, in a trust, whether revocable or irrevocable, if the property was an asset of the trust at all times between October 1, 1999 and the date of the decedent's death; the decedent was not married to the decedent's surviving spouse when the property was transferred to the trust; and the property was a nonmarital asset immediately prior to the decedent's death. Also, a cross-reference in subsection (4) is clarified.

Uniform Disposition of Community Property Rights at Death Act Sections 732.216 through 732.228, F.S.¹⁹

Section 31 -- Amends s. 732.218, F.S., regarding rebuttable presumptions related to the Florida Uniform Disposition of Community Property Rights at Death Act, making grammar and style changes only.

Section 32 -- Amends s. 732.219, F.S., regarding disposition upon death under the Florida Uniform Disposition of Community Property Rights at Death Act, making grammar and style changes only.

Section 33 -- Amends s. 732.221, F.S., regarding perfection of title of a personal representative or a beneficiary under the Florida Uniform Disposition of Community Property Rights at Death Act.

Present Situation: Sections 732.216 through 732.228, F.S., are known as the Florida Uniform Disposition of Community Property Rights at Death Act. "Community property" is a legal concept followed by some of the states regarding property owned by married persons. In a community property state, all property owned by a married person is owned jointly with the spouse, and each spouse owns an equal one-half share of the property. Nine states are community property states, Florida is not a community property state.²⁰ An individual who formerly lived in a community

¹⁹ These sections are within Part II, entitled "Elective Share of Surviving Spouse", and while they are related to the issue of elective share, these sections are not part of the elective share law.

²⁰ The nine states are Louisiana, Texas, New Mexico, Arizona, California, Washington, Idaho, Nevada, and Wisconsin. Black's Law Dictionary, 6th edition.

property state and was married while living there may move to Florida, and still own, on the date of death, property subject to community property laws in that other state.

Section 732.221, F.S., provides that a personal representative has no duty to discover whether any property of the deceased is community property unless a written demand is made by an interested person within 6 months after first publication of the notice of administration.

This section is similar to s. 732.223, F.S., regarding perfection of title in the surviving spouse.

Effect of Proposed Changes: Changes the time limit for filing the written demand to 3 months after service of the notice of administration (as to beneficiaries), or 3 months after the first publication of the notice to creditors. Also, grammar and style changes are made.

Section 34 -- Amends s. 732.222, F.S., regarding purchaser for value or lender, making grammar and style changes only.

Section 35 -- Amends s. 732.223, F.S., regarding perfection of title of surviving spouse.

Present Situation: Sections 732.216 through 732.228, F.S., are known as the Florida Uniform Disposition of Community Property Rights at Death Act. Section 732.223, F.S., provides that a surviving spouse may have title to community property declared to be solely the property of the surviving spouse by court order or by court approval of an instrument of title signed by the personal representative or heirs. The personal representative has no duty to discover whether property held by the decedent is community property unless the surviving spouse makes a written demand within 6 months after the first publication of the notice of administration.

Effect of Proposed Changes: Changes the time limit for filing the written demand to 3 months after service of the notice of administration on the surviving spouse. Also, grammar and style changes are made.

Part III of Chapter 732, F.S. Pretermitted Spouse and Children

Section 36 -- Amends s. 732.302, F.S., regarding pretermitted children.

Present Situation: A pretermitted child is a child of a decedent that was born (or adopted) after the decedent executed a will being probated. If a pretermitted child is not provided for by the will, the pretermitted child is entitled to a share equal to what the child would have received had the testator died intestate. However, a pretermitted child will not receive the pretermitted share of the estate if it appears from the will that the omission was intentional, or if the testator had one or more children when the will was executed and the will gives substantially all of the estate to the other parent of the pretermitted child.

Effect of Proposed Changes: Provides a qualification, applicable to the exception for a share of the estate to a pretermitted child where the will devises substantially all of the estate to the other parent of the pretermitted child, which requires that the other parent survive the testator and that the other parent is entitled to take under the will.²¹ Also, grammar and style changes are made.

²¹ The phrase "and that other parent survived the testator and is entitled to take under the will" is from Section 2-302 of the Uniform Probate Code.

**Part IV of Chapter 732, F.S.
Exempt Property and Allowances**

Section 37 -- Amends s. 732.401, F.S., regarding descent of homestead.

Present Situation: Homestead real property is exempt from creditor claims whether the decedent died testate or intestate. As such, it is distributed to beneficiaries notwithstanding the claims of creditors, but subject to any mortgage or lien. Ordinarily, homestead real property will pass to heirs under the same rules as other property (other than the liability for debts of the decedent), except that if the decedent died intestate and was survived by a spouse and by lineal descendants, the spouse receives a life estate in the real property, and the lineal descendants alive at the time of the decedent's death receive a vested remainder interest.²² Section 732.104, F.S., provides that all intestate distributions are to be "per stirpes".²³

In *Snyder v. Davis*, 699 So.2d 999 (Fla. 1997), the Florida Supreme Court ruled that homestead protections apply to all persons who are potential heirs under the intestacy laws. In light of that decision, it is arguable that all lineal descendants, and not just those that would inherit on a per stirpes basis, would be entitled to the vested remainder interest.

Effect of Proposed Changes: Provides that intestate distribution of the vested remainder interest in homestead property is "per stirpes". The effect is contrary to the decision in *Snyder*, and thus may affect the continued use of that case as precedent. Also, grammar and style changes are made.

Section 38 -- Amends s. 732.4015, F.S., regarding devise of homestead.

Present Situation: Section 732.4015(1), F.S., restates the homestead portion of the Florida Constitution²⁴ which provides that a homestead is not subject to devise if a spouse or minor child survives the owner, except that the homestead may be devised to the owner's spouse if there is no minor child. Subsection (2) provides that "owner" includes the settlor of a trust over which the settlor reserved the right to amend or revoke the trust. This subsection (2) roughly describes what is commonly referred to as a revocable trust, although the description is brief and therefore not well defined.

Section 733.707(3), F.S., sets forth a comprehensive definition of a revocable trust.

Effect of Proposed Changes: Replaces the archaic term "settlor" with the term "grantor". Provides that "owner" includes the grantor of a revocable trust as defined at s. 733.707(3), F.S. Also, grammar and style changes are made.

Section 39 -- Amends s. 732.402, F.S., regarding exempt property.

Present Situation: Certain property is made "exempt" by the probate code. Exempt property is property that is exempt from the claims of creditors, and thus is given to beneficiaries notwithstanding whether there are sufficient assets to pay all of the claims against the estate. Section 733.402(4), F.S., provides that exempt property set forth in the Probate Code is in addition

²² A life estate is the legal right to exclusive possession of real property until one's death. A vested remainder interest means that lineal descendants own the homestead property, but cannot take possession of it until the surviving spouse dies.

²³ "Per stirpes" means "that method of dividing an intestate estate where a class or group of distributes take the share which their deceased would have been entitled to, had he or she lived, taking thus by their right of representing such ancestor, and not as so many individuals. It is the antithesis of *per capita*." Black's Law Dictionary, 6th edition.

²⁴ Art. X, s. 4(c), Fla.Const.

to property passing to the spouse or heirs of the decedent pursuant to the homestead provisions of the Florida Constitution, property passing under the will, or by intestate succession, elective share, or family allowance. A person claiming entitlement to exempt property must petition the court for a determination that the property is exempt within 4 months of the first publication of the notice of administration.

The value of exempt property is excluded when calculating the value of the estate for residuary, intestate, pretermitted, or elective share purposes.²⁵

Effect of Proposed Changes: Provides that exempt property is in addition to protected homestead, statutory entitlements, and property passing under the will or by intestate succession. The term "protected homestead" is new to the Probate Code, and is defined at new s. 731.201(29), F.S., of this act. The term "statutory entitlements" is not defined. Statutory entitlements includes homestead, exempt property, elective share, pretermitted share, family allowance, and any other property that a person is entitled to receive from an estate by statute.²⁶

Section 40 -- Amends s. 732.403, F.S., regarding family allowance.

Present Situation: A spouse or lineal heir²⁷ of the deceased that was dependent upon the decedent for support may petition the probate court for a family allowance. The family allowance is an immediate distribution of monies to assist the dependent with living expenses during the probate case. A family allowance is not automatic, the dependent must petition the court. The family allowance is a class 5 claim.²⁸ If awarded, the family allowance is not chargeable against any benefit or share passing to the dependent by intestate succession, elective share, or by will, unless the will otherwise provides. The family allowance that may be paid from a decedent's estate is limited to \$6,000, which limit has remained the same since the Probate Code was enacted in 1974.

Effect of Proposed Changes: The \$6,000 sum is increased to \$18,000 to account for inflation.²⁹

Part V of Chapter 732, F.S. Wills

Section 41 -- Amends s. 732.501, F.S., regarding who may make a will.

²⁵ See, *Walker v. Redding*, 23 So. 565 (Fla. 1898) (homestead real property is not part of the estate); s. 732.402(4), F.S. (as to intestate estate); *Solomon v. Dunlap*, 372 So.2d 218 (Fla. 1st DCA 1979) (pretermitted share determined on "net" value of estate); and ss. 732.2105 & 732.402(4), F.S. (as to elective share). The residuary estate is the net estate after payment of all charges, debts, costs, and specific requests. *In re: Estate of Miller*, 301 So.2d 137 (Fla. 4th DCA 1974).

²⁶ The bill proponents intend for the phrase "statutory entitled" to be broadly construed. Telephone conference with Rohan Kelley, Laird Lile, and Pete Dunbar, November 28, 2000.

²⁷ For purpose of this section, the term "lineal heir" means lineal ascendants (parents, grandparents, great-grandparents, and so forth), and lineal descendants (child, grandchildren, great-grandchildren, and so forth).

²⁸ The classifications are as follows: Class 1.--Costs, expenses of administration, and compensation of personal representatives and their attorneys' fees. Class 2.--Reasonable funeral, interment, and grave marker expenses, not to exceed the aggregate of \$6,000. Class 3.--Debts and taxes with preference under federal law. Class 4.--Reasonable and necessary medical and hospital expenses of the last 60 days of the last illness of the decedent, including compensation of persons attending him or her. Class 5.--Family allowance. Class 6.--Arrearage from court-ordered child support. Class 7.--Debts acquired after death by the continuation of the decedent's business, in accordance with s. 733.612(22), but only to the extent of the assets of that business. Class 8.--All other claims.

²⁹ According to a calculation by the American Institute for Economic Research, using the Consumer Price Index calculated by the United States of America, Bureau of Labor Statistics, \$6,000 in 1974 equals \$18,095 in 2000. <http://www.aier.org>. The figure is rounded for ease in use and practice.

Present Situation: Any person 18 years of age or older and who is of sound mind may make a will. Chapter 743, F.S., provides procedures under which certain minors may have the disabilities of nonage removed, i.e., become an emancipated minor. An emancipated minor has all legal rights of an adult, including the right to make a valid will.

Effect of Proposed Changes: Specifies that an emancipated minor may make a will. Also, grammar and style changes are made.

Section 42 -- Amends s. 732.502, F.S., regarding execution of wills, making grammar and style changes only.

Section 43 -- Amends s. 732.503, F.S., regarding self-proof of will.

Present Situation: A valid will or codicil, under Florida law, requires execution by the maker and two witnesses. For a will to be admitted to probate, it must be "proved" (authenticated). For a will that does not contain a self-proof to be admitted to probate, one of the subscribing witnesses must certify to the authenticity of the will. Because wills are often admitted to probate many years after their making, finding one of the witnesses is often difficult. Thus, will drafters will typically include a self-proof section in conformity with s. 732.503, F.S. A self-proof requires that a notary be present at the will signing in addition to the two witnesses and the testator.

The self-proof form requires a sworn statement by the testator and each of the witnesses, which under notary laws requires a formal swearing in and a formal affirmation that statements made are true and correct, as if the document were an affidavit.³⁰ Notary laws also allow for documents to be "acknowledged", whereby the signer of the document is acknowledged by the notary to be the person named.

Many Florida residents have moved here from other states. A will that includes a self-proof in conformity with Florida law but executed in another state may be admitted to probate as if self-proved under Florida law.

Effect of Proposed Changes: Re-writes the self-proof form to provide that the form requires an acknowledgment, rather than on oath or affirmation. Also provides that a will which complies with the self-proof provisions of the state where executed is considered to have complied with Florida law regarding self-proof of wills.

Section 44 -- Amends s. 732.505, F.S., regarding revocation by writing, making grammar and style changes only.

Section 45 -- Amends s. 732.507, F.S., regarding effect of subsequent marriage, birth, or dissolution of marriage, making grammar and style changes only.

Section 46 -- Amends s. 732.513, F.S., regarding devises to trustee, making grammar and style changes only.

Section 47 -- Amends s. 732.514, F.S., regarding vesting of devises, making grammar and style changes only.

³⁰ Under the form, a testator and witnesses are to be sworn just as a witness is required to be sworn in a court hearing. Bill proponents state that the formal procedure is "awkward to comply with", and that most attorneys conducting a will signing ceremony follow the simpler rules for taking an acknowledgment. Comments of bill proponents dated September 17, 2000.

Section 48 -- Amends s. 732.515, F.S., regarding separate writing identifying devisees of tangible property.

Present Situation: A will may refer to a written statement or list that provides for the disposition of specific items of personal property. The list must be signed by the testator, and may be changed or amended at any time without affecting the validity of the will.³¹

Effect of Proposed Changes: Provides that the supplemental list must be specifically referred to in the will; that it may not be used to dispose of property used in trade or business;³² and that if more than one list exists, then, to the extent of any conflict among the lists, the provisions of the most recent list are deemed to revoke the inconsistent provisions of a prior list.

Part VI of Chapter 732, F.S. Rules of Construction

Section 49 -- Amends s. 732.6005, F.S., regarding rules of construction and intention, making grammar and style changes only.

Section 50 -- Amends s. 732.601, F.S., regarding simultaneous death law, making grammar and style changes only.

Section 51 -- Amends s. 732.603, F.S., regarding antilapse; deceased devisee; class gifts.

Present Situation: When a will devises property to a person, and that person is not alive at the time of the decedent's death, then that person cannot receive the property and the property is said to have lapsed. When a devise lapses, the property becomes part of the residuary estate, and the testator's intent for the devise may be carried out. While good drafting of wills avoids this result, many wills are poorly drafted and even the best of drafting may not be able to account for all the possible changes that may occur in the many years between will drafting and death.

Section 732.603, F.S., provides that a lapsed devise to a grandparent of the decedent, or to a lineal descendant of a grandparent of the decedent, will not lapse but is to be distributed to lineal descendants per stirpes. It is not clear whether this section applies to testamentary trusts.

Effect of Proposed Changes: Provides that the antilapse provisions apply to testamentary trusts in addition to being applicable to wills. Also, grammar and style changes are made.

Section 52 -- Amends s. 732.604, F.S., regarding failure of testamentary provision, making grammar and style changes only.

Section 53 -- Amends s. 732.605, F.S., regarding change in securities; accessions; nonademption.

Present Situation: If a will provides that a beneficiary is to receive specific securities rather than their cash value, the beneficiary is only entitled to as much of the devised securities as are in the estate, any additional securities of the same entity owned by the testator because of action initiated by the entity (excluding any acquired by the exercise of purchase options), and securities of another

³¹ Without this statute, any writing declaring testamentary intent may possibly be construed to be a revocation of a previous will, even though the intent was merely to supplement the will without the formality and cost of drafting an entire new will. Persons wishing to distribute heirlooms and items of sentimental value to the family commonly use this provision.

³² According to bill proponents, this change "clarifies that mention of the separate writing in the will is essential and not merely permissive. The permissive mischief arises from the frequent use of the word 'may' which is deleted" Comments of September 17, 2000.

entity owned by the testator as a result of merger, consolidation, reorganization, or other similar action initiated by the entity. Distributions before death are not included in the specific devise.³³

Effect of Proposed Changes: Additionally provides that, if a beneficiary is to receive specific securities rather than their cash value, additional shares of the specific security acquired by the testator as part of a dividend reinvestment plan will be included in the specific bequest to the beneficiary. Further, specifies that both cash and non-cash distributions before death are not added to a specific devise of securities. Also, grammar and style changes are made.

Section 54 -- Amends s. 732.606, F.S., regarding nonademption of specific devises in certain cases; sale by guardian of the property; unpaid proceeds of sale, condemnation, or insurance.

Present Situation: A testator may provide in a will for the specific devise of property.³⁴ Normally, if the decedent no longer owns the specifically devised property at the time of death, the bequest simply fails. If a guardianship proceeding is instituted against an individual, the guardian may sell property of the ward even though the ward may have kept that property so that it could be specifically devised at death. Section 732.606, F.S., provides that, if a guardianship sells specifically devised property for the care and maintenance of the ward, the intended beneficiary is entitled to the net proceeds. This section does not apply if the testator was restored to capacity at least one year before death.

Effect of Proposed Changes: Removes the limitation that the sale must have been for the care or maintenance of the ward. Thus, s. 732.606, F.S., will be applicable to all sales by a guardian regardless of the circumstances of the sale. Also, grammar and style changes are made.

Part VII of Chapter 732, F.S. Contractual Arrangements Relating to Death

Section 55 -- Amends s. 732.701, F.S., regarding agreements concerning succession.

Present Situation: The phrase "agreements concerning succession" refers to an agreement to make a will, to give a devise, not to revoke a will, not to revoke a devise, not to make a will, or not to make a devise. Agreements concerning succession are found in many forms, most notably in premarital, separation, and divorce agreements. An agreement concerning succession must be in writing and signed in the presence of two witnesses to be enforceable.

Effect of Proposed Changes: Additionally provides that an agreement regarding succession executed by a nonresident of Florida is valid in a Florida probate proceeding if the agreement was valid under the laws of the state or country when and where executed.

Section 56 -- Amends s. 732.702, F.S., regarding waiver of spousal rights.

Present Situation: A spouse may agree to waive some or all statutory rights to a surviving spouse's share of an estate. These agreements may be entered into at any time, although they are most commonly found in premarital agreements. Any or all of these rights may be partly or wholly waived by written agreement. Unlike wills and agreements concerning succession, a waiver does not require the formalities of a will (namely that there be two subscribing witnesses).

³³ For example, a dividend declared before death is property of the estate, not the beneficiary.

³⁴ A specific devise is a statement that a particular item is to be given to a particular person. It is the opposite of a general devise. For example, a devise of \$500 is a general devise. A specific devise would be "I direct the personal representative to give my china and silver to my daughter Mary Smith."

Effect of Proposed Changes: Requires that a waiver of statutory rights to a surviving spouse's share of an estate must be in writing and signed in the presence of two subscribing witnesses. Additionally, provides that a waiver of spousal rights executed in another jurisdiction is valid in Florida if executed under the applicable laws of that jurisdiction. Also, grammar and style changes are made.

Part VIII of Chapter 732, F.S. General Provisions

Section 57 -- Amends s. 732.801, F.S., regarding disclaimer of interests in property passing by will or intestate succession or under certain powers of appointment.

Present Situation: A person who is entitled to receive property from an estate may disclaim the property, in which case the property is distributed as if the disclaiming person had predeceased the testator. An insolvent person may not exercise the right of disclaimer if the person is insolvent at the time that the right to the property vests.

Effect of Proposed Changes: Changes the time of determining insolvency for purpose of the limitation on disclaimer by insolvent persons from the time that the interest vests to the time that the disclaimer is recorded. Also, grammar and style changes are made.

Section 58 -- Amends s. 732.804, F.S., regarding provisions relating to disposition of the body.

Present Situation: A personal representative ordering cremation of the decedent's body, and a person providing cremation services, who act in accordance with a provision in a will or any written contract expressing a desire for cremation, is not civilly liable for the ordering or carrying out of a cremation.

Effect of Proposed Changes: Provides that, before letters of administration are issued, any person may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements. Further provides that any "written direction" by the decedent may allow cremation. The change to "any person may carry out written instructions of the decedent" expands the class of persons who may be insulated from liability, and the insulation from liability is extended beyond cremation to include all funeral and burial arrangements. Also, grammar and style changes are made.

Part IX of Chapter 732, F.S. Production of Wills

Section 59 -- Amends s. 732.901, F.S., regarding production of wills, making grammar and style changes only.

Part X of Chapter 732, F.S. Anatomical Gifts

Section 60 -- Transfers and renumbers s. 732.910, F.S., as s. 765.510, F.S. Chapter 765, F.S., entitled Health Care Advance Directives, is more closely matched to this subject matter.

Section 61 -- Transfers and renumbers s. 732.911, F.S., as s. 765.511, F.S.

Section 62 -- Transfers and renumbers s. 732.912, F.S., as s. 765.512, F.S., and corrects cross-references.

Section 63 -- Transfers and renumbers s. 732.913, F.S., as s. 765.513, F.S.

Section 64 -- Transfers and renumbers s. 732.914, F.S., as s. 765.514, F.S., and corrects cross-references.

Section 65 -- Transfers and renumbers s. 732.915, F.S., as s. 765.515, F.S., and corrects cross-references.

Section 66 -- Transfers and renumbers s. 732.916, F.S., as s. 765.516, F.S.

Section 67 -- Transfers and renumbers s. 732.917, F.S., as s. 765.517, F.S., and corrects cross-references.

Section 68 -- Transfers and renumbers s. 732.918, F.S., as s. 765.518, F.S.

Section 69 -- Transfers and renumbers s. 732.9185, F.S., as s. 765.5185, F.S.

Section 70 -- Transfers and renumbers s. 732.919, F.S., as s. 765.519, F.S.

Section 71 -- Transfers and renumbers s. 732.921, F.S., as s. 765.521, F.S., and corrects cross-references.

Section 72 -- Transfers and renumbers s. 732.9215, F.S., as s. 765.5215, F.S.

Section 73 -- Transfers and renumbers s. 732.92155, F.S., as s. 765.52155, F.S.

Section 74 -- Transfers and renumbers s. 732.9216, F.S., as s. 765.5216, F.S.

Section 75 -- Transfers and renumbers s. 732.922, F.S., as s. 765.522, F.S., and corrects cross-references.

Section 76 -- Amends s. 381.004, F.S., correcting cross-references only.

Section 77 -- Amends s. 381.0041, F.S., correcting cross-references only.

**Chapter 733, F.S.
Administration of Estates**

**Part I of Chapter 733, F.S.
General Provisions**

Section 78 -- Amends s. 733.101, F.S., regarding venue of probate proceedings, making grammar and style changes only.

Section 79 -- Amends s. 733.103, F.S., regarding effect of probate, making grammar and style changes only.

Section 80 -- Amends s. 733.104, F.S., regarding suspension of statutes of limitation in favor of the personal representative.

Present Situation: If a person entitled to bring a cause of action dies before the expiration of an applicable statute of limitations period, the personal representative may commence the cause of action "after the expiration and within 12 months from the date of the decedent's death." Defendants in lawsuits where the plaintiff is an estate have tried to argue that this clause shortens all applicable statutes of limitation for causes of action owned by an estate to 12 months from the date of death.³⁵

Effect of Proposed Changes: Specifies that the statute of limitations on an action owned by the decedent is the *later* of the original statute of limitations or 12 months from the death, thereby specifying that the statute of limitations on any action owned by a decedent is not shortened to 12 months from the date of death. Also, grammar and style changes are made.

Section 81 -- Amends s. 733.105, F.S., regarding determination of beneficiaries.

Present Situation: The personal representative may file a petition seeking a determination of the beneficiaries of an estate. The procedures for the petition are set forth.

Effect of Proposed Changes: Deletes the procedural aspects contained in s. 733.105, F.S.³⁶ Allows any interested person, not just the personal representative, to file a petition to determine heirs. Also, grammar and style changes are made.

Section 82 -- Amends s. 733.106, F.S., regarding costs and attorney fees.

Present Situation: A person nominated as personal representative of the last known will, or any proponent of the will if the person so nominated does not act within a reasonable time, is entitled to reimbursement of costs and attorney's fees from the estate if the person acted in good faith in offering the will for probate. Any attorney who has rendered services to an estate may apply for an order awarding attorney's fees.

Effect of Proposed Changes: Eliminates the requirement that a will offered to probate be the "last known" will; thus, a person offering any will to probate who acts in good faith will be entitled to reimbursement.³⁷ Also, makes grammar and style changes.

Section 83 -- Amends s. 733.107, F.S., regarding burden of proof in will contests, making a grammar change only.

Section 84 -- Amends s. 733.109, F.S., regarding revocation of probate.

Present Situation: A proceeding to revoke probate must be filed in the court where the will was admitted to probate. The procedures for revocation of probate are set forth in statute.

Effect of Proposed Changes: Provides that a proceeding to revoke probate is to be filed in the court having jurisdiction over the administration. Removes procedural matters. Also, grammar and style changes are made.

³⁵ *Mackle v. Mackle*, 389 So.2d 1081 (3rd DCA 1980) (ruling that statute does not create a blanket 12 month statute of limitations).

³⁶ The procedure is found at Probate Rule 5.385.

³⁷ In *Furlong v. Raimi*, 735 So.2d 583 (Fla. 3rd DCA 1999), a successful proponent of an earlier will was denied reimbursement for attorney's fees because of the limitation on who is entitled to reimbursement found in s. 733.106(2), F.S. This change alters the continuing precedential value of the *Furlong* case.

Part II of Chapter 733, F.S. Commencing Administration

Section 85 -- Amends s. 733.201, F.S., regarding proof of wills, making grammar and style changes only.

Section 86 -- Amends s. 733.202, F.S., regarding a petition for administration of an estate.

Present Situation: Any interested person may file a petition for administration of an estate. The contents of the petition are detailed.

Effect of Proposed Changes: Deletes the list of information required by a petition for administration, leaving only the substantive right to file a petition for administration.³⁸

Section 87 -- Repeals s. 733.203, F.S., regarding when notice is required.

Present Situation: Section 733.203(1), F.S., provides for the required notice procedure if a caveat has been filed by an heir or a devisee under a will other than that being offered for probate. Section 733.203(2), F.S., provides that no notice need be given of the petition for administration or of the order granting letters when it appears that the petitioner is entitled to preference of appointment; but that before letters are granted to any person who is not entitled to preference, formal notice must be served on all known persons qualified to act as personal representative and entitled to preference equal to or greater than the applicant, unless those entitled to preference waive the right in writing.

Effect of Proposed Changes: Deletes statute as procedural in nature.³⁹

Section 88 -- Amends s. 733.204, F.S., regarding probate of a will written in a foreign language.

Present Situation: In admitting a will to probate, a court must establish the correct English translation. If the original will is not or cannot be filed, a photographic copy of the original will must be filed. At any time during the administration any interested person may have the correctness of the translation of the will, or any part, redetermined after formal notice to all other interested persons.

Effect of Proposed Changes: Deletes procedural portions of s. 733.204(2), F.S.⁴⁰ Also, grammar and style changes are made.

Section 89 -- Amends s. 733.205, F.S., regarding probate of notarial will, making grammar and style changes only.

Section 90 -- Amends s. 733.206, F.S., regarding probate of will of resident after foreign probate, making grammar and style changes only.

Section 91 -- Amends s. 733.207, F.S., regarding establishment and probate of lost or destroyed will.

Present Situation: Section 733.207, F.S., provides the procedural steps for the establishment and probate of a lost or destroyed will.

³⁸ The list of required information for inclusion in a petition for administration is found at Probate Rule 5.200.

³⁹ The substance of the deleted provisions is covered by Probate Rules 5.260(f) and 5.201.

⁴⁰ The substance of the deleted provisions is covered by Probate Rule 5.210.

Effect of Proposed Changes: Deletes procedural matters from s. 733.207, F.S. Also, makes grammar and style changes.⁴¹

Section 92 -- Amends s. 733.208, F.S., regarding discovery of later will.

Present Situation: A later written will, if otherwise valid, is considered a revocation of the earlier will. Section 733.208, F.S., provides that any interested person may offer a later will to probate.

Effect of Proposed Changes: Deletes procedural matters.⁴² Also, grammar and style changes are made.

Section 93 -- Amends s. 733.209, F.S., regarding estates of missing persons, making grammar and style changes only.

Section 94 -- Amends s.733.212, F.S., regarding notice of administration; filing of objections.

Present Situation: Section 733.212, F.S., requires a personal representative to prepare a notice of administration. It sets forth the required contents of the notice of administration. The notice of administration must be published once a week for two weeks. A copy of the notice of administration must be served on the spouse, beneficiaries, and creditors of the estate.

This section has caused much confusion and many problems in recent years. The format was initially designed to give notice to beneficiaries of the estate, and thus it is confusing when served upon creditors. The failure to give notice of a pending estate proceeding to a creditor is one of the significant practical estate problems.

Effect of Proposed Changes: Deletes procedural matters from s. 733.212, F.S. Deletes the requirement that the notice of administration be served on creditors; and deletes the publication requirement. Provides that the notice of administration is to additionally be served on persons who may be entitled to exempt property and on any other person who may claim an interest in the estate. Adds requirement that a notice of administration identify the date of any will or codocil that has been offered for probate. Removes procedural matters covered by the Probate Rules. New s. 733.2121, created by this act, creates a new form for notice to creditors, which is the form that will be published.

Section 95 -- Creates s.733.2121, F.S., regarding notice to creditors; filing of claims.

Present Situation: Section 733.212, F.S., requires the personal representative to make a diligent search to determine the names and addresses of creditors of the decedent. The personal representative must serve a copy of the notice of administration upon such creditors. Due process requires "actual notice to known or reasonably ascertainable creditors" of a decedent of a pending probate case regarding that decedent in order to bar claims. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988).

Effect of Proposed Changes: Creates a new form entitled Notice to Creditors. A copy of the notice of administration is no longer furnished to creditors. The notice to creditors is published once a week for two consecutive weeks, as the notice of administration formerly was. A copy of the notice to creditors must be furnished to known or reasonably ascertainable creditors, as the notice of administration was. A personal representative is not personally liable for wrongfully

⁴¹ The substance of the deleted provisions is covered by Probate Rules 5.510 and 5.025.

⁴² The substance of the deleted provisions is covered by Probate Rule 5.270 and 5.210.

furnishing, or failing to furnish, a notice to creditors. Additionally requires that known contingent creditors must be furnished a copy of the notice to creditors.

Present Situation: Section 733.212, F.S., requires the personal representative to make a diligent search to determine the names and addresses of creditors of the decedent. The Agency for Health Care Administration (AHCA) is considered a reasonably ascertainable creditor if the decedent had received Medicaid benefits after reaching age 55.

Effect of Proposed Changes: Provides that if a decedent was 55 years of age or older at the time of death, the personal representative must serve a copy of the notice to creditors on AHCA within three months after the first publication of the notice to creditors, unless the agency has filed a statement of claim in the estate.

Section 96 -- Amends s. 733.2123, F.S., regarding adjudication before issuance of letters, making grammar and style changes only.

Section 97 -- Amends s. 733.213, F.S., regarding probate as prerequisite to judicial construction of will, making grammar and style changes only.

Part III of Chapter 733, F.S. Priority to Administer and Qualifications of Personal Representative

Section 98 -- Amends s. 733.301, F.S., regarding preference in appointment of personal representative, making grammar and style changes only.

Section 99 -- Amends s. 733.302, F.S., regarding who may be appointed personal representative, making grammar and style changes only.⁴³

Section 100 -- Amends s. 733.305, F.S., regarding trust companies and other corporations and associations, making grammar and style changes only.

Section 101 -- Amends s. 733.306, F.S., regarding effect of appointment of a debtor.

Present Situation: Section 733.306, F.S., provides that if a person indebted to the decedent is appointed as personal representative of the estate of that decedent, the mere appointment does not extinguish the debt due to the decedent. A testator may, however, release a debt by a specific provision in a will.

Effect of Proposed Changes: Deletes as unnecessary the provision that a testator may release a debt by will. Also, a grammar or style change is made.

Section 102 -- Amends s. 733.307, F.S., regarding succession of administration, making grammar and style changes only.

Section 103 -- Amends s. 733.308, F.S., regarding administrator ad litem, making grammar and style changes only.

Section 104 -- Amends s. 733.309, F.S., regarding executor de son tort, making grammar and style changes only.

⁴³ The final sentence regarding persons not qualified to be appointed as personal representative is duplicative of s. 733.303, F.S.

Section 105 --Creates s. 733.310, F.S., regarding personal representative not qualified.

Present Situation: A personal representative who suffers some event making the personal representative no longer qualified to act as a personal representative has no duty to inform the court or interested parties.⁴⁴

Effect of Proposed Changes: Creates a new duty of a personal representative. A personal representative must inform the court and interested parties at any time the personal representative believes or should believe that he or she is no longer qualified for appointment as a personal representative. The notice must state the reason. A personal representative who fails to comply with this requirement may be personally liable for costs and attorney's fees incurred in any proceeding to remove the person as personal representative.

Part IV of Chapter 733, F.S. Appointment of Personal Representative; Bonds

Section 106 -- Repeals s. 733.401, F.S., regarding issuance of letters.

Present Situation: Section 733.401, F.S., provides the procedure for issuance of letters of administration.

Effect of Proposed Changes: Deletes the section as unnecessary.⁴⁵ The provision requiring a clerk of court to approve a bond without a fee is moved by another section of this act to s. 733.402, F.S.

Section 107 -- Amends s. 733.402, F.S., regarding bond of fiduciary.

Present Situation: Every person to whom letters of administration are granted must post a bond, unless the bond requirement is waived by the will or by the court. Section 733.401(1)(c), F.S., provides that a clerk of court may not charge a service fee for approval of the bond. Section 733.403(2), F.S., provides that a court may waive the bond requirement, require a bond, increase or decrease the bond, or require additional security.

Effect of Proposed Changes: Moves the waiver of clerk's service charge from s. 733.401, F.S. (deleted by another section of this act), into subsection (1). Moves s. 733.403(2), F.S., to new subsection (4). Also, makes grammar and style changes.

Section 108 -- Amends s. 733.403, F.S., regarding amount of bond.

Present Situation: Section 733.403(1), F.S., provides that the court sets the amount of a bond required to be posted by a person granted letters of administration. The court is to consider the gross value of the estate, the relationship of the personal representative to the beneficiaries, exempt property and any family allowance, the type and nature of assets, and liens and encumbrances on the assets. Subsection (2) provides that a court may waive the bond requirement, require a bond, increase or decrease the bond, or require additional security.

⁴⁴ Examples of circumstances that would make a personal representative no longer qualified to act as a personal representative include conviction of felony, or appointment of a guardian of the person. Death of the personal representative would also make the personal representative no long qualified to act as personal representative, although in that situation the personal representative apparently would be unable to provide notice after the fact.

⁴⁵ The applicable rules are found at Probate Rule 5.235.

Effect of Proposed Changes: Deletes subsection (2), which is moved to s. 733.402, F.S. Additionally requires the court to consider the sum of the claims of known creditors when determining an appropriate bond amount.

Section 109 -- Amends s. 733.404, F.S., regarding liability of surety, making grammar and style changes only.

Section 110 -- Amends s. 733.405, F.S., regarding release of surety.

Present Situation: The surety for a bond posted by a personal representative or curator has the right to cancel the surety contract and seek a release from further liability.⁴⁶ Upon notice of cancellation, the probate court must conduct a hearing at which the court must release the surety and must order the personal representative or curator to post a new bond; and if the personal representative or curator is unable to post a new bond, the personal representative or curator will be immediately removed from office. The surety is liable for all acts or omissions of the personal representative or fiduciary up to the time that a new bond is posted.

Effect of Proposed Changes: Changes the terms “personal representative” and “curator” to the term “principal”, thereby making s. 733.405, F.S., applicable to all principals (fiduciaries) that have posted a bond under the Probate Code.⁴⁷ Also, grammar and style changes are made.

Section 111 -- Amends s. 733.406, F.S., regarding bond premium allowable as expense of administration.

Present Situation: A fiduciary who posts a bond may charge the estate for the reasonable cost of the bond; although the chargeable cost is limited to 1% of the face amount of the bond. Bill proponents report that in recent years it has become difficult to find a surety company willing to issue a bond for a fee of 1% or less.⁴⁸

Effect of Proposed Changes: Deletes the 1% limitation. Also, substantial grammar and style changes are made.⁴⁹

Part V of Chapter 733, F.S. Curators; Successor Personal Representatives; Removal

Section 112 -- Amends s. 733.501, F.S., regarding curators.

Present Situation: A curator is “a person appointed by the court to take charge of the estate of a decedent until letters are issued.”⁵⁰ A curator is a short term personal representative appointed to act in an interim period when a personal representative cannot be appointed. Section 733.501, F.S., provides the procedures for appointment of a curator.

⁴⁶ For instance, a surety that discovers a theft or mismanagement by the personal representative would typically seek to withdraw the surety in order to minimize the potential for future loss. Such a motion would usually, in practice, lead to removal of the personal representative.

⁴⁷ For instance, a trustee of a testamentary trust may have posted a bond.

⁴⁸ Telephone conference with Rohan Kelley, December 13, 2000.

⁴⁹ Bill proponents commented, regarding this section (September 17, 2000): “This was probably the most archaic and out of date section in the probate code.”

⁵⁰ Section 731.201(7), F.S.

Effect of Proposed Changes: Removes procedural matters from statute.⁵¹ Specifies that a curator is subject to removal and surcharge as a personal representative is; and specifies that the court may consider the fee provisions relating to personal representatives at s. 733.617, F.S., when determining a fee payable to a curator. Also, grammar and style changes are made.

Section 113 -- Amends s. 733.502, F.S., regarding resignation of personal representative.

Present Situation: A personal representative may resign as personal representative. The court must approve the resignation, and may only do so after receiving a final accounting (including all books and papers and all assets) from the personal representative. After resignation, a personal representative remains liable for all actions taken prior to the time that the resignation was accepted by the court.

Effect of Proposed Changes: Additionally provides that the court may not accept the resignation of a personal representative unless the interests of the estate are not jeopardized by the resignation. Deletes here the requirement of a final accounting, which requirement is moved to, and further expanded upon, in s. 733.5036, F.S., created by this act. Also, grammar and style changes are made.

Section 114 -- Amends s. 733.503, F.S., regarding appointment of successor upon resignation.

Present Situation: Unless there is a joint personal representative, the resignation of a personal representative may not be accepted until there is a replacement personal representative. Section 733.507, F.S., requires the court to appoint a successor personal representative upon resignation of a sole personal representative.

Effect of Proposed Changes: Provides that, if the court accepts the resignation of a personal representative, the court must appoint either a successor personal representative, or a curator to serve until a successor personal representative is appointed.

Section 115 -- Creates s. 733.5035, F.S., regarding surrender of assets after resignation.

Present Situation: Section 733.502, F.S., requires a resigning personal representative to turn over all estate property to the successor personal representative.

Effect of Proposed Changes: Provides that a resigning personal representative is to turn over all estate assets, records, documents, papers, and other property of or concerning the estate to the successor fiduciary (revised s. 733.503, F.S., requires that there be a successor fiduciary). Further provides that the court may establish the conditions and time of the turnover.⁵²

Section 116 -- Creates s. 733.5036, F.S., regarding accounting and discharge following resignation.

Present Situation: Section 733.502, F.S., requires an accounting by a resigning personal representative. The probate code does not specify when or how a resigning personal representative is to be paid for services rendered prior to the resignation.

⁵¹ The applicable procedure is found at Probate Rule 5.122.

⁵² Bill proponents explained this change as follows (from Comments dated September 17, 2000): "Several "cart-before-the-horse" issues are addressed regarding resignation of the personal representative. These involve the sequence of resignation; appointment of a successor, delivery of assets, accounting, compensation, and discharge. These matters are sequenced [by the changes] so the administration of the estate is uninterrupted while the resigning personal representative is replaced, compensated, and ultimately discharged. This is similar to procedure involving a removed personal representative."

Effect of Proposed Changes: Moves from s. 733.502, F.S., to new s. 733.5036, F.S., the requirement that a resigning personal representative file and serve a final accounting. Further provides that, after determination and satisfaction of the liability, if any, of the resigning personal representative, after compensation of the personal representative and the attorney and other persons employed by the personal representative, and upon receipt of evidence that undistributed estate assets have been delivered to the successor fiduciary, the personal representative is to be discharged, the bond released, and the surety discharged.

Section 117 -- Amends s. 733.504, F.S., regarding removal of a personal representative, making grammar and style changes only.

Section 118 -- Amends s. 733.505, F.S., regarding jurisdiction in removal proceedings.

Present Situation: The court that issued the letters of administration hears a petition for removal of a personal representative.

Effect of Proposed Changes: Changes the place of hearing a removal proceeding to provide that the court that has jurisdiction over the estate of the decedent hears a petition for removal of a personal representative.⁵³

Section 119 -- Amends s. 733.506, F.S., regarding proceedings for removal.

Present Situation: Any interested person may file a petition for removal of a personal representative. The Probate Code does not specifically require that letters of administration be revoked, and is not specific as to when discharge of a removed personal representative occurs.

Effect of Proposed Changes: Provides that a court must revoke the letters of administration previously issued to a removed personal representative. Further specifies that the act of removal of a personal representative does not exonerate any legal liability of the personal representative or the surety of the personal representative.

Section 120 -- Creates s. 733.5061, F.S., regarding appointment of successor upon removal.

Present Situation: Section 733.507, F.S., requires the court to appoint a successor personal representative upon removal of a sole personal representative.

Effect of Proposed Changes: Provides that the court must appoint a successor personal representative, or a curator to serve until a successor personal representative is appointed, when a personal representative is removed.

Section 121 -- Repeals s. 733.507, F.S., regarding administration following resignation or removal.

Present Situation: When a personal representative has resigned or is removed and there is a remaining personal representative, no other personal representative shall be appointed unless the will otherwise requires. The remaining personal representative, together with any successor personal representative, if appointed, shall complete the administration of the estate. If the resigned or removed personal representative is a sole personal representative, the court must appoint a successor personal representative.

⁵³ In the vast majority of probate cases, the court that issues letters of administration is the court that has jurisdiction over the estate of the decedent. This change will only affect cases where the probate case was filed in the wrong jurisdiction.

Effect of Proposed Changes: Deletes s. 733.507, F.S. Other sections of this act provide for the appointment of a successor personal representative and/or a curator when a personal representative resigns or is removed.

Section 122 -- Amends s. 733.508, F.S., regarding accounting and discharge upon removal.

Present Situation: A removed personal representative must file a final accounting within 30 days after removal. The Probate Code does not specify when or how a removed personal representative is to be paid for services rendered prior to removal.

Effect of Proposed Changes: Eliminates the 30 day time period, thus providing that the court determines the time for filing of a final accounting. Further provides for payment to the removed personal representative, and for discharge of the removed personal representative upon satisfaction of the duties required of a removed personal representative.⁵⁴

Section 123 -- Amends s. 733.509, F.S., regarding surrender of assets upon removal.

Present Situation: Section 733.509, F.S., requires a removed personal representative to deliver to the remaining or successor personal representative all property of the decedent and all records and documents of the estate.

Effect of Proposed Changes: Requires a removed personal representative to *immediately* turn over all assets and records of the estate to the successor fiduciary.

Part VI of Chapter 733, F.S. Duties and Powers of Personal Representative

Section 124 -- Amends s. 733.601, F.S., regarding time of accrual of duties and powers.

Present Situation: The duties and powers of a personal representative commence upon appointment, although prior acts that are beneficial to the estate occurring before appointment are ratified by the appointment of the personal representative. Before issuance of letters, a person named as executor of the will may carry out written funeral and burial instructions.

Effect of Proposed Changes: Removes the provision regarding funeral and burial instructions of the decedent; which provision is moved to s. 734.804, F.S. Also, grammar and style changes are made.

Section 125 -- Amends s. 733.602, F.S., regarding duties of a personal representative, making grammar and style changes only.

Section 126 -- Amends s. 733.603, F.S., regarding personal representative to proceed without court order, making grammar and style changes only.

Section 127 -- Amends s. 733.604, F.S., regarding inventory.

Present Situation: An inventory (a list of the assets of the estate) must be filed within 60 days of the issuance of letters of administration.

⁵⁴ The amended statute does not require payment of fees to a discharged personal representative, it merely provides that the fees, if earned, are payable. The court will, as in current law, have the discretion to deny payment of any fees to a personal representative removed for cause.

Effect of Proposed Changes: Deletes the 60 day requirement as procedural. Also, makes grammar and style changes. Further, the requirement that the inventory be verified is moved to subsection (1).

Present Situation: Section 733.604(1)(b), F.S., provides for the opening and inventory of a safety deposit box.

Effect of Proposed Changes: Deletes paragraph (b). The requirements for opening a safety deposit box are moved to new s. 733.6065, F.S.

Present Situation: The personal representative must serve a copy of the inventory on the Department of Revenue, the surviving spouse, each heir at law in an intestate estate, each residuary beneficiary in a testate estate, and any other interested person who may request it. The personal representative must file proof of such service.

Effect of Proposed Changes: Deletes the service requirements as procedural.⁵⁵

Present Situation: A personal representative must file an amended inventory if additional assets are discovered, or if the earlier filed inventory is erroneous or misleading.

Effect of Proposed Changes: Makes grammar and style changes only.

Present Situation: A personal representative must furnish a beneficiary of an asset a written explanation of how that asset was valued.

Effect of Proposed Changes: Requires that, if a beneficiary has requested a written explanation of how an asset was valued, the personal representative must furnish that beneficiary with a copy of any appraisal report that was made regarding that item. Also, grammar and style changes are made.

Section 128 -- Repeals s. 733.605, F.S., regarding appraisers.

Present Situation: A personal representative may employ an appraiser or appraisers to assist in ascertaining the fair market value of any asset.

Effect of Proposed Changes: Deletes the specific authorization to employ appraisers. The general authority to employ professionals to assist a personal representative is a traditional and appropriate power of a personal representative. The specific authorization is moved to s. 733.602(19), F.S.

Section 129 -- Creates s. 733.6065, F.S., regarding opening safe-deposit box.

Present Situation: Section 733.604(1)(b), F.S., provides that the initial opening of any safe-deposit box of a decedent must be conducted in the presence of an employee of the institution where the box is located and the personal representative. The inventory of the contents of the box also must be conducted in the presence of the employee and the personal representative, each of whom must verify the contents of the box by signing a copy of the inventory. The personal representative must file the safe-deposit box inventory with the court within 10 days after the box is opened.

⁵⁵ The applicable procedure is at Probate Rule 5.340.

Effect of Proposed Changes: Deletes the safe-deposit box provision at s. 733.604(1)(b), F.S., which is moved to new s. 733.6065, F.S. The initial opening of a decedent's safe-deposit box must be conducted by any two of the following: an employee of the financial institution, the personal representative, or the personal representative's attorney of record. The two persons who open the box must prepare an inventory under oath. The inventory, together with a copy of the financial institution's box entry record including the time period from 6 months prior to death through the date of inventory, must be filed with the court within 10 days of opening the safety deposit box. This inventory is confidential, as are other inventories filed with a probate court. Additionally, the personal representative may remove the contents of the box.⁵⁶ The section is cross-referenced in new s. 655.936(4), F.S. (a part of the law on financial institutions).

Section 130 -- Amends s. 733.607, F.S., regarding possession of estate.

Present Situation: Unless provided otherwise by will, a personal representative has a right to take possession of the decedent's property, other than homestead property. The personal representative must take possession of this property, unless left in the possession of the person presumptively entitled to the property. 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 administration of the decedent's estate and enforceable claims of the decedent's creditors, the personal representative is entitled to payment from the trustee of a revocable trust established by the decedent, in the amount the personal representative certifies in writing to be required to satisfy such insufficiency.

A personal representative may have to file a lawsuit against such a revocable trust to compel payment to the estate. A creditor of the decedent (who becomes a creditor of the estate upon death), however, may not file a lawsuit against such a revocable trust. *Tobin v. Damian*, 723 So.2d 396 (Fla. 4th DCA 1999); *Estate of Read v. A.D.K. Properties*, 766 So.2d 393, 394 (Fla. 2nd DCA 2000) (ruling that creditor should have opened an estate if no other interested party did so).

Effect of Proposed Changes: Expands the payable items for which a charge may be made against a revocable trust to "expenses of the administration and [all] obligations of the decedent's estate", thus including items such as funeral expenses, debts and taxes with

⁵⁶ Comments by the bill proponents regarding these changes (September 17, 2000): "Banks, not infrequently, now require a court order to inventory a safe deposit box, even in the face of unrestricted letters. Also, some banks now charge a fee for the attendance of their employee. This change will make administration easier. The last sentence authorizing the personal representative to remove contents is added to make clear that this procedure differs from the statute authorizing the box inventory before letters are issued. The new requirement to attach a copy of the box entry record is an IMPORTANT AND CONTROVERSIAL change. A lot of "hanky-panky" goes on with safe deposit boxes and their contents. It is probably the largest "hole" through which estate assets "leak" in fraud of beneficiaries, creditors and taxing authorities. This provision was amended into law May 30, 1997 (as s. (1)(b) of 733.604), principally as a result of many courts restricting letters for this purpose. By this amendment we have liberalized the inventory requirements, but fraud is still a possibility, especially where the PR is the person who had access to the box, either with or without the decedent. The requirement of filing the box inventory does little good if the personal representative (as an individual joint box lessee) has already emptied the box by entry at an earlier time. The entry record filing requirement does not solve all possible problems, but it does solve some of them. A lot of disappearing safe deposit box assets will suddenly appear when the box entry record becomes a part of the required filing. This will reveal to all interested persons box entries immediately prior to, or in some cases (where there is a joint box lessee), shortly after death, before the inventory is done. If you, as attorney now (without this requirement) see the entry record while inventorying the box (you must sign in on it), and see that your client, the personal representative, has been in the (joint) box a few hours after death and before this "official entry", what are your obligations to make that fact know to the court or beneficiaries? That is a very tough question you should not have to answer on your own. Also, you should not have the liability that goes with deciding the issue one way or the other. This statute will provide the answer. This is a small inconvenience to the personal representative (unless he wishes to conceal an entry into the box) which will provide for much greater openness in estate administration."

preference under federal law, and family allowance. Also, grammar and style changes are made.

See s. 737.3061, F.S., created by this act, which reaffirms the doctrine set forth in *Tobin v. Damian*, 723 So.2d 396 (Fla. 4th DCA 1999); and *Estate of Read v. A.D.K. Properties*, 766 So.2d 393, 394 (Fla. 2nd DCA 2000); that a creditor may not file a direct action against a revocable trust, but is limited to filing a claim against the estate.

Section 131 -- Amends s. 733.608, F.S., regarding general power of the personal representative.

Present Situation: A personal representative is to take possession and control of all assets of the decedent other than homestead assets.

Effect of Proposed Changes: Expands the power of a personal representative by providing that a personal representative is authorized, but not required, to take possession of homestead property that is not in the possession of the person that may ultimately be entitled to that property, for the limited purpose of preserving, insuring, and protecting it for the heir or beneficiary until a determination of homestead status is made by the court. Further provides that a personal representative may, but is not required to, collect rents and profits from the property.

Section 132 -- Amends s. 733.609, F.S., regarding improper exercise of power and breach of fiduciary duty by a personal representative.

Present Situation: A personal representative may be liable to an interested person if the personal representative exercises power concerning the estate in an improper manner or in bad faith. The prevailing party in any litigation regarding improper exercise of power by a personal representative must be awarded costs and attorney's fees.

Effect of Proposed Changes: Changes the liability of a personal representative to provide that a personal representative's fiduciary duty is the same as the fiduciary duty of a trustee of an express trust, and a personal representative is liable to interested persons for damage or loss resulting from the breach of this duty. The effect of this change is that a personal representative will be liable for a failure to act in addition to being liable for wrongful actions. Also, grammar and style changes are made.

Section 133 -- Amends s. 733.610, F.S., regarding sale, encumbrance or transaction involving conflict of interest, making grammar and style changes only.

Section 134 -- Amends s. 733.611, F.S., regarding persons dealing with the personal representative, making grammar and style changes only.

Section 135 -- Amends s. 733.612, F.S., regarding transactions authorized for the personal representative; exceptions.

Present Situation: Section 733.612, F.S., lists 27 specific powers of a personal representative. Subsection (4) provides that if funds of the estate are not needed to meet debts and expenses currently payable and are not immediately distributable, a personal representative must deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements, or other prudent investments that would be reasonable for use by trustees.

Sections 518.10 -.14, F.S., codify what is known as the "Prudent Investor Rule". The prudent investor rule provides guidelines to fiduciaries regarding what kinds of investments are appropriate for such fiduciaries to utilize when investing funds belonging to a beneficiary. A fiduciary that invests funds in compliance with the prudent investor rule is generally not liable to the beneficiary for any loss in the value of the fund, nor is the fiduciary liable to the beneficiary because a different investment would have yielded a higher return.

Effect of Proposed Changes: Deletes subsection (4), replacing it with a specific reference to the prudent investor rule at ss. 518.10-.14, F.S. Also, grammar and style changes are made to all of s. 733.612, F.S.

Section 136 -- Amends s. 733.6121, F.S., regarding the relationship between the powers of a personal representative and laws relating to environmental or human health.

Present Situation: Section 733.6121, F.S., sets forth the duties and obligations of a personal representative regarding property of the estate that is or may be contaminated with hazardous or toxic substances. Subsection (7) provides that s. 733.6121, F.S., applies to any estate admitted to probate on or after July 1, 1995.

Effect of Proposed Changes: Modifies the effective date to provide that s. 733.6121, F.S., applies to estates of decedents dying on or after July 1, 1995. Also, grammar and style changes are made to all of s. 733.6121, F.S.

Section 137 -- Amends s. 733.613, F.S., regarding personal representative's right to sell real property.

Present Situation: A personal representative may sell real property of the estate. If the will does not give a specific power of sale, or if the decedent dies intestate, the sale must be authorized by, or confirmed by, the court. Title insurance companies generally require that the claims period expire (90 days after the notice of administration is first published) before they will allow a title insurance policy to issue without exception for the rights of creditors.

Effect of Proposed Changes: Removes procedural matters from statute.⁵⁷ Additionally, adds a new subsection (3), which provides that where a sale or mortgage occurs under a specific power to sell or mortgage real property, or under a court order authorizing or confirming the sale, the purchaser or lender takes title free of claims of creditors of the estate and entitlements of estate beneficiaries. The real property sold under this subsection will remain subject to existing liens and mortgages.

Section 138 -- Amends s. 733.614, F.S., regarding powers and duties of successor personal representative, making grammar and style changes.

Section 139 -- Amends s. 733.615, F.S., regarding joint personal representatives; when joint action required, making grammar and style changes only.

Section 140 -- Amends s. 733.616, F.S., regarding powers of surviving personal representatives, making grammar and style changes only.

Section 141 -- Amends s. 733.617, F.S., regarding compensation of personal representative.

⁵⁷ Applicable rules are found at Probate Rule 5.040, 5.330, 5.370, and 5.041.

Present Situation: A personal representative is entitled to a commission or fee for acting as personal representative. The commission is a sliding scale percentage of the value of the estate plus the total earnings of the estate. A personal representative is entitled to an additional fee for special services rendered to the estate. The commission is automatically payable unless objected to by an interested party, but a fee for extraordinary services must be applied for and granted by the court.⁵⁸

Effect of Proposed Changes: Adds “dealing with protected homestead” property as a type of extraordinary service for which a personal representative may receive additional compensation. Also, grammar and style changes are made.

Section 142 -- Amends s. 733.6171, F.S., regarding compensation of attorney for the personal representative.

Present Situation: The attorney for the personal representative is entitled to a fee for providing ordinary legal services for the personal representative. The fee is a stepped sliding scale percentage of the sum of the value of the estate plus the total earnings of the estate. The attorney for the personal representative is entitled to an additional fee for special services rendered to the estate. The fee for ordinary services is automatically payable unless objected to by an interested party, but a fee for extraordinary services must be applied for and granted by the court.

Effect of Proposed Changes: Makes grammar and style changes to s. 733.6171, F.S.

Present Situation: Section 733.6171(6), F.S., provides that the court may determine fees without receiving expert witness testimony. The court may direct from what part of the estate the fee is to be paid.

Effect of Proposed Changes: Deletes subsection (6), and moves the provisions to s. 733.6175, F.S.

Present Situation: Section 733.6171(8), F.S., provides that court proceedings to determine the reasonableness of an attorney’s fee are a part of the probate case and thus not a separate proceeding. Further, the attorney’s fees related to the hearing on fees for the case may give rise to an additional claim for fees.

Effect of Proposed Changes: Deletes subsection (8), and moves the provisions to s. 733.6175, F.S.

Present Situation: Section 733.6171(9), F.S., provides that the amount and manner of determining the compensation for the attorney for the personal representative must be set forth in the final accounting, except under certain circumstances.

Effect of Proposed Changes: Deletes subsection (9) as procedural.

Present Situation: Section 733.6171(10), F.S., provides what is in effect a retroactive effective date for s. 733.6171, F.S. In *Bitterman v. Bitterman*, 714 So.2d 356, 364 (Fla. 1998), the Florida Supreme Court ruled that subsection (10) was an improper retroactive act, and that accordingly the “1993 changes can only be applied to cases for which the legal right to attorney’s fees vests on or after October 1, 1993.”

⁵⁸ A personal representative is not required to charge a fee or commission; and it is typical for a personal representative to waive the fee or commission.

Effect of Proposed Changes: Deletes subsection (10).

Section 143 -- Amends s. 733.6175, F.S., regarding proceedings for review of employment of agents and compensation of personal representatives and employees of estate.

Present Situation: The probate court may determine the propriety of any cost, fee, or commission payable to a personal representative or professional employed by the estate. If contested, the party seeking the cost, fee, or commission, has the burden of showing the propriety of the employment and the reasonableness of the cost, fee, or commission. Section 733.6171(6), F.S., provides that the court may determine attorney's fees without receiving expert witness testimony; and that the court may direct from what part of the estate the fee is to be paid. Section 633.6171(8), F.S., provides that court proceedings to determine the reasonableness of an attorney's fee are a part of the probate case and thus not a separate proceeding. Further, the estate may be charged the attorney's fees incurred in a court proceeding on costs, fees and commissions.

In *Estate of Good*, 696 So.2d 876 (Fla. 4th DCA 1997), *review denied*, 705 So.2d (Fla. 1997), an estate beneficiary challenged the reasonableness of the attorney's fee requested by the attorney for the personal representative. On appeal, the attorney for the personal representative employed separate appellate counsel. After the appeal concluded, the trial court awarded the attorney for the personal representative a separate fee for the appellate counsel. The beneficiary appealed the award of fees for the appellate counsel, and the appellate court, citing to the portion of s. 733.6171, F.S. which provides that only the attorney for the personal representative may be reimbursed fees incurred in a fee challenge, denied payment of the appellate fees.

Effect of Proposed Changes: Moves, and makes grammar and style changes to, ss. 733.6171(6) and 733.6171(8), F.S. Alters the precedential effect of *Estate of Good*, by providing in subsection (2) that court proceedings to determine the reasonable compensation of "any person" employed by the personal representative may warrant additional compensable fees incurred in a contest regarding those fees. Expands the ability to determine fees without expert witness testimony from attorney's fees to all fees. Also, grammar and style changes are made.

Section 144 -- Amends s. 733.619, F.S., regarding individual liability of personal representative, making grammar and style changes only.

Part VII of Chapter 733, F.S. Creditors' Claims

Section 145 -- Amends s. 733.701, F.S., regarding notifying creditors.

Present Situation: A personal representative must publish the notice of administration, and furnish a copy of it to creditors as required by s. 733.212, F.S., unless the probate case is one filed under Chapter 734, F.S. (ancillary administration), or Chapter 735, F.S. (summary and family administration). Section 733.212(4), F.S., requires a personal representative to make a diligent search to determine the creditors of the estate, and to serve on those creditors a copy of the notice of administration. Section 733.710, F.S., provides that debts of the decedent are barred if a claim is not filed in the estate within 2 years of death.

Effect of Proposed Changes: Changes "notice of administration" to the new form "notice to creditors". Provides that notice to creditors is not required if claims are barred by s. 733.710, F.S. Removes the exemptions for cases filed under Chapters 734 and 735, F.S.

Section 146 -- Amends s. 733.702, F.S., regarding limitations on presentation of claims.

Present Situation: All claims against a decedent's estate must be filed within the later of 3 months of the first publication of the notice of administration, or 30 days following service of a copy of the notice of administration upon the creditor.

In *Agency for Health Care Administration v. Estate of Johnson*, 743 So.2d 83 (Fla. 3rd DCA 1999), a young boy was injured in an automobile accident. He suffered severe spinal cord injuries, and died four years later as a result of those injuries. During his lifetime, Medicaid paid nearly \$700,000 for medical care related to the accident. The Agency for Health Care Administration (AHCA), as administrator of the Medicaid program, filed a lien in the public records, and after the death filed a caveat with the probate court. AHCA failed, however, to file a timely claim in the probate case. When the estate settled the personal injury case for \$2.2 million dollars, AHCA moved to collect on its lien. The estate then moved to bar the claim, citing to s. 733.702, F.S. The district court of appeal ruled that the filing of the lien in the public records was a "filing" sufficient to comply with the requirement of s. 733.702, F.S.

Effect of Proposed Changes: Specifies that a filing of a claim must be "in the probate proceeding", or the claim will be barred. This change would alter the precedential effect of *Agency for Health Care Administration v. Estate of Johnson*, 743 So.2d 83 (Fla. 3rd DCA 1999).

Present Situation: Section 733.702(4)(c), F.S., provides that the Department of Revenue, as a creditor of an estate, may file an untimely claim in a probate case if such claim is filed within 30 days after the service of the inventory on the department or, in the event an amended or supplementary inventory has been prepared, within 30 days after the service of the amended or supplementary inventory on the department. The department reviews inventories filed in probate cases as part of the estate tax assessment process, and in determining whether the decedent failed to pay intangible tax during the decedent's lifetime.

Effect of Proposed Changes: Moves provisions regarding the Department of Revenue to new subsection (5). Limits the filing of untimely claims by the department to claims filed under Chapter 199, F.S., which is the chapter on the intangible tax, and to claims regarding the estate tax. Provides that the filing of an amended inventory gives the department the right to file an amended claim, but the amended claim may only be amended to include claims that are related to the additional information disclosed in the amended inventory.

Section 147 -- Amends s. 733.703, F.S., regarding form and manner of presenting claims, making grammar and style changes only.

Section 148 -- Amends s. 733.704, F.S., regarding amendment of claims, making grammar and style changes only.

Section 149 -- Amends s. 733.705, F.S., regarding payment of and objection to claims.

Present Situation: Section 733.705(2), F.S., provides that an interested person may file an objection to a creditor's claim. Section 733.705(4), F.S., provides that the affected creditor has 30 days after service of the objection within which to initiate legal action regarding that claim. Should the creditor fail to timely initiate legal action, the claim is barred.

Effect of Proposed Changes: Deletes procedural matters and refers to the Probate Rules. Further provides that an objection to a claim constitutes an objection to an amendment of that

claim unless the objection is withdrawn.⁵⁹ Adds new subsection (3), which provides that, when a person other than the personal representative files an objection, the personal representative may apply to the court for an order relieving the personal representative of the obligation to defend the estate in the action or for the objector to be appointed as administrator ad litem to defend the action. Fees for the attorney for the administrator ad litem may be awarded. A personal representative may grant a creditor an extension of time within which to initiate legal action on an objected claim. Also, grammar and style changes are made.

Section 150 -- Amends s. 733.707, F.S., regarding order of payment of expenses and obligations.

Present Situation: Section 733.707, F.S., sets for the schedule or order of payments of obligations of an estate. Eight classes of claims are defined. Each class must be paid in full before payment may be made to any creditor in the following class. If there are insufficient funds to pay a class in full, all allowed creditors of the class are paid pro-rata, and claims in following classes are not paid. The classes of claims are:

Class 1. Costs, expenses of administration, and compensation of personal representatives and their attorneys' fees.

Class 2. Reasonable funeral, interment, and grave marker expenses, whether paid by a guardian, the personal representative, or any other person, not to exceed the aggregate of \$6,000.

Class 3. Debts and taxes with preference under federal law. Section 409.9101(7), F.S., provides that a claim under s. 409.9101, F.S., is a Class 3 claim. Section 414.28(1), F.S., provides that a claim under s. 414.28, F.S., is a Class 3 claim.

Class 4. Reasonable and necessary medical and hospital expenses of the last 60 days of the last illness of the decedent, including compensation of persons attending him or her.

Class 5. Family allowance. Section 732.403, F.S., provides that the total allowable family allowance is \$6,000.

Class 6. Arrearage from court-ordered child support.

Class 7. Debts acquired after death by the continuation of the decedent's business, but only to the extent of the assets of that business.

Class 8. All other claims, including those founded on judgments or decrees rendered against the decedent during the decedent's lifetime, and any excess over the sums allowed in Class 2 and Class 4.

Effect of Proposed Changes: Amends the classes as follows:

Class 1. Adds attorney's fees awarded under s. 733.106(3), F.S. These are attorney's fees payable to an attorney who benefits the estate or increases assets available for payment of claims. These attorney's fees are a Class 8 claim under current law.⁶⁰

⁵⁹ Bill proponents explain (September 17, 2000): This eliminates the necessity to object each time a claim is amended, with the chance of missing that subsequent objection.

⁶⁰ Under current law, an attorney may work to increase the value of the estate, only to find that creditors in prior classes are entitled to all of the assets in the estate, which results in no payment to the attorney. An attorney faced with this possibility will typically refuse to act on behalf of the estate.

Class 2. Removes unnecessary cross-reference.

Class 3. Adds cross-references to claims filed under to ss. 409.9101 or 414.28, F.S.

Class 4. Makes grammar and style changes only.

Class 5. No change to text here, although the change to s. 732.403, F.S., in this act, increases the total allowable family allowance to \$18,000.

Class 6. No change.

Class 7. No change.

Class 8. No change.

Also, grammar and style changes are made to the other provisions in s. 732.707, F.S.

Section 151 -- Amends s. 733.708, F.S., regarding compromise of claims, making grammar and style changes, and removing procedural matters.⁶¹

Section 152 -- Amends s. 733.710, F.S., regarding limitations on claims against estates, making grammar and style changes only.

Part VIII of Chapter 733, F.S. Special Provisions for Distribution

Section 153 -- Amends s. 733.801, F.S., regarding delivery of devises and distributive shares.

Present Situation: A personal representative cannot be compelled to pay or deliver property to a beneficiary until 5 months has elapsed from the granting of letters of administration.

Effect of Proposed Changes: Adds a provision that, unless otherwise provided in the will, the personal representative must pay as an expense of the estate the reasonable expenses of storage, insurance, packing, and delivery of tangible personal property to a beneficiary.

Section 154 -- Amends s. 733.802, F.S., regarding proceedings for compulsory payment of devises or distributive interest, making grammar and style changes only.

Section 155 -- Amends s. 733.803, F.S., regarding encumbered property, making grammar and style changes only.

Section 156 -- Amends s. 733.805, F.S., regarding the order in which assets are appropriated.

Present Situation: Where the assets of the estate are insufficient to fund the bequests set forth in the will, and where the will is unclear as to the order in which those bequests are made, s. 733.805, F.S., provides the order in which bequests are made.

Effect of Proposed Changes: Changes term "appropriate" to more correct term of "abate". Makes grammar and style changes to subsections (1) and (2). Adds subsection (3), the text of

⁶¹ The applicable procedure is at Probate Rule 5.041.

which is moved from subsection (1) for clarity. Adds subsection (4), which provides that a revocable trust of the decedent, and the decedent's will, must be construed as one instrument for purposes of abatement, and for purposes of s. 733.607(2), F.S. (possession of estate), and s. 737.3054(2), F.S. (trustee's duty to pay expenses and obligations of a settlor's estate).

Section 157 -- Amends s. 733.806, F.S., regarding advancement, making grammar and style changes only.

Section 158 -- Amends s. 733.808, F.S., regarding death benefits; disposition of proceeds.

Present Situation: Death benefits⁶² may be payable to a trustee of a trust created either before the death of the decedent, or by the decedent's will. If no claimant collects death benefits within 6 months after the death of the decedent, the obligor must pay the death benefits to the personal representative of the decedent. Unless the named beneficiary is the estate, death benefits are payable outside of the estate, and thus are deemed not a part of the probate estate. Being outside the probate estate, these benefits are not subject to creditors claims and are not used in computing the commission to the personal representative, nor the fees owed to the attorney for the personal representative.

Effect of Proposed Changes: Adds that death benefits are also not liable for the contribution required under s. 733.607(2), F.S. (right of an estate to demand the costs of administration from a revocable trust established by the decedent). Also, makes grammar and style changes.

Section 159 -- Amends s. 733.809, F.S., regarding right of retainer, making grammar and style changes only.

Section 160 -- Amends s. 733.810, F.S., regarding distribution in kind; valuation.

Present Situation: A "distribution in kind" is the transfer of a specific asset to a beneficiary, as opposed to selling the asset and distributing the net cash proceeds. A "pecuniary devise" is a devise in money. Assets must be distributed in kind unless a general power of sale is conferred in the will, the will specifies that an asset be to be sold, or a provision of the Probate Code requires that an asset be sold. The family allowance or a pecuniary devise may be satisfied by a distribution in kind unless the person entitled to it demands cash and no residuary devisee has requested that the asset remain a part of the residuary estate. Property distributed in kind must be valued at fair market value as of the date of distribution.

Effect of Proposed Changes: Adds that, in addition to family allowance and a pecuniary devise, a distribution from or regarding the following may be satisfied by a distribution in kind unless the person entitled to it demands cash and no residuary devisee has requested that the asset remain a part of the residuary estate: a testamentary trust, elective share funding, pretermitted spouse or child shares, and the spouse's portion of the intestate estate.

Present Situation: Section 733.810(3), F.S., provides that a personal representative or a trustee may, with the consent of all affected beneficiaries, distribute assets non-pro rata among the beneficiaries.

⁶² Death benefits include the death benefits from an individual life insurance policy; a group life insurance policy; an employees' trust or under a contract purchased by an employees' trust forming part of a pension, stock bonus, or profit-sharing plan; an annuity or endowment contract; or a health and accident policy.

Effect of Proposed Changes: Deletes the requirement that the personal representative obtain the consent of beneficiaries before distributing assets non-pro rata.⁶³

Section 161 -- Amends s. 733.811, F.S., regarding distribution; right or title of distributee, making grammar and style changes only.

Section 162 -- Amends s. 733.812, F.S., regarding improper distribution or payment; liability of distributee or payee.

Present Situation: A person who receives an improper distribution or payment from an estate must return the property or money received.

Effect of Proposed Changes: Adds a requirement that a person returning an improper distribution or payment from an estate must also pay to the estate income earned from the property or interest on the funds. Also, grammar and style changes are made.

Section 163 -- Amends s. 733.813, F.S., regarding purchasers from distributees protected, making grammar and style changes only.

Section 164 -- Amends s. 733.814, F.S., regarding partition for purpose of distribution, making grammar and style changes only.

Section 165 -- Amends s. 733.815, F.S., regarding private contracts among interested persons, making grammar and style changes only.

Section 166 -- Amends s. 733.816, F.S., regarding disposition of unclaimed property held by a personal representative.

Present Situation: Section 733.816, F.S., details how a personal representative is to deal with unclaimed property.

Effect of Proposed Changes: Adds that the provisions of s. 733.816, F.S., are also applicable to property refused by the intended recipient. Also, grammar and style changes are made.

Section 167 -- Amends s. 733.817, F.S., regarding apportionment of estate taxes.

Present Situation: Section 733.817, F.S., provides the formula by which estate taxes are apportioned between interested parties. Paragraph (1)(l) defines "revocable trust" to mean "a trust as defined in s. 731.201(33)⁶⁴ created by the decedent to the extent that the decedent had at his or her death the power to alter, amend, or revoke the trust either alone or in conjunction with any other person."

⁶³ Bill proponents explain the reason for this change (September 17, 2000): [Subsection] (5) is changed to permit non-prorata [sic] distributions without consent of the beneficiaries to attempt to obtain a favorable tax result under Rev. Rul. 69-486 by avoiding gain recognition on funding.

⁶⁴ Section 731.201(33), F.S., defines "trust" to mean "an express trust, private or charitable, with additions to it, wherever and however created. It also includes a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts; conservatorships; personal representatives; custodial arrangements pursuant to the Florida Gifts to Minors Act; business trusts providing for certificates to be issued to beneficiaries; common trust funds; land trusts under s. 689.05, F.S.; trusts created by the form of the account or by the deposit agreement at a financial institution; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is nominee or escrowee for another."

Effect of Proposed Changes: Redefines “revocable trust” to mean “a trust described in s. 733.707(3)”. Section 733.707(3), F.S., describes a revocable trust, and provides that certain revocable trusts are liable for the expenses of the estate administration and obligations of the decedent’s estate. Also, grammar and style changes are made.

Part IX of Chapter 733, F.S. Closing Estates

Section 168 -- Amends s. 733.901, F.S., regarding final discharge.

Present Situation: Section 733.901, F.S., provides court procedures necessary for the entry of a final discharge. Various accountings and other paperwork are prescribed.

Effect of Proposed Changes: Deletes court procedure.⁶⁵ Also, grammar and style changes are made.

Section 169 -- Amends s. 733.903, F.S., regarding subsequent administration, making grammar and style changes only.

Chapter 734, F.S. Probate Code: Foreign Personal Representatives; Ancillary Administration

Section 170 -- Amends s. 734.101, F.S., regarding foreign personal representative, making grammar and style changes only.

Section 171 -- Amends s. 734.102, F.S., regarding ancillary administration.

Present Situation: An ancillary administration is an administration of Florida assets owned by a deceased nonresident. Section 734.102, F.S., provides court procedures necessary for the filing of a petition for ancillary administration.

Effect of Proposed Changes: Deletes procedural requirements.⁶⁶ Specifies that the requirements for notice to creditors is required in ancillary administration as required in a domiciliary probate proceeding. Also, grammar and style changes are made.

Section 172 -- Amends s. 734.1025, F.S., regarding small estates of certain nonresidents.

Present Situation: Section 734.1025, F.S., provides an optional abbreviated procedure for determining the disposition of personal property owned by a nonresident who dies leaving property worth \$25,000⁶⁷ or less. To utilize the procedure, the personal representative for the probate case filed in the decedent’s place of domicile must file copies of the relevant estate documents that show the proper disposition of the property, and must give notice to creditors. If no creditor claims are filed, the property may be distributed to the beneficiary of beneficiaries. If one or more creditor claims are filed, the abbreviated procedure terminates and the court must appoint an ancillary personal representative.

⁶⁵ The applicable rules are found at Probate Rules 5.346, 5.400, 5.401.

⁶⁶ The applicable rules are found at Probate Rule 5.470.

⁶⁷ The \$25,000 figure is from Chapter 80-203, Laws of Florida. According to a calculation by the American Institute for Economic Research, using the Consumer Price Index calculated by the United States of America, Bureau of Labor Statistics, \$25,000 in 1980 equals \$52,123.79 in 2000. <http://www.aier.org>. The figure is rounded for ease in use and practice.

Effect of Proposed Changes: Limits s. 734.1025, F.S., to testate estates. Expands the allowable value of the property located in Florida from \$25,000 to \$50,000. Removes procedural matters.⁶⁸ Also, makes grammar and style changes.

Section 173 -- Amends s. 734.104, F.S., regarding foreign wills, making grammar and style changes only.

Section 174 -- Amends s. 734.201, F.S., regarding jurisdiction by act of foreign personal representative, making grammar and style changes only.

Section 175 -- Amends s. 734.202, F.S., regarding jurisdiction by act of decedent, making grammar and style changes only.

Chapter 735, F.S. Family Administration and Small Estates

Part I: Family Administration

Sections 176-178 -- Repeals ss. 735.101, 735.103, and 735.107, F.S., regarding family administration.

Present Situation: Family Administration is an optional simplified probate proceeding for smaller estates. Family administration is available provided:

- In an intestate estate, that the heirs at law of the decedent consist solely of a surviving spouse, lineal descendants, and lineal ascendants, or any of them.
- In a testate estate, that the beneficiaries under the will consist of a surviving spouse, lineal descendants, and lineal ascendants, or any of them, and that any specific or general devise to others constitutes a minor part of the decedent's estate.
- In a testate estate, that the decedent's will does not direct administration as required by ch. 733, F.S.
- That value of the gross estate, as of the date of death, for federal estate tax purposes is less than \$60,000.
- That the entire estate consists of personal property or, if real property forms part of the estate, that administration under chapter 733 has proceeded to the point that all claims of creditors have been processed or barred.

Effect of Proposed Changes: Eliminates family administration.

Part II of Chapter 735, F.S. Summary Administration

Section 179 -- Amends s. 735.201, F.S., regarding summary administration; nature of proceedings.

Present Situation: Summary administration is an optional simplified probate proceeding for smaller estates. Summary administration is available for a resident or nonresident decedent's

⁶⁸ The applicable rules are at Probate Rule 5.475.

estate, where the value of the entire estate subject to administration in this state, less the value of property exempt from the claims of creditors, does not exceed \$25,000⁶⁹ or that the decedent has been dead for more than 2 years. It is not available in a testate estate if the decedent's will requires formal administration.

Effect of Proposed Changes: Expands the jurisdictional amount for summary administration from \$25,000 to \$75,000.

Section 180 -- Amends s. 735.203, F.S., regarding petition for summary administration.

Present Situation: A petition for summary administration must be signed by all beneficiaries and by the personal representative named in the will, if there is one. The procedural requirements for the petition for summary administration are set forth.

Section 735.209, F.S., provides that, when any heir is required to join in any agreement or petition regarding a summary administration, but that person has died, become incompetent, is a minor, or has conveyed or transferred all of his or her interest in the property of the estate, then the heirs, devisees, and surviving spouse, if any, of a deceased person; the personal representative of a deceased person; the guardian of an incompetent or minor⁷⁰; or the grantee or transferee of any of them; may be substituted. Further, any beneficiary who will receive full distribution does not have to join in the petition for summary administration, but must be given formal notice of the petition.

Effect of Proposed Changes: Deletes procedural matters. Moves the provisions of s. 735.209, F.S., into s. 735.203, F.S. Also, makes grammar and style changes.

Section 181 -- Amends s. 735.206, F.S., regarding summary administration distribution.

Present Situation: If a petition for summary administration is filed, and the will proved, the court may enter an order of summary administration, which order directs immediate distribution of the assets to the persons apparently entitled to the assets. Notice to creditors is not required. Property of the decedent that is not exempt from claims of creditors that remains in the hands of those to whom it was assigned is liable for claims against the decedent until such time as claims are barred. Without notice to creditors, claims against a decedent are barred after two years from the date of death. Until the claims period has expired, a petitioner for an order of summary administration is liable to creditors up to the value of any distribution that the petitioner received, less the value of exempt property received.

Section 735.2063, F.S., provides that any person who has obtained an order of summary administration may publish notice to creditors, and that all creditor claims not filed within 3 months of the first publication are then barred.

Due process requires "actual notice to known or reasonably ascertainable creditors" of a decedent of a pending probate case regarding that decedent in order to bar claims. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988). Since that ruling, probate attorneys have advised personal representatives that they must provide actual notice to known or reasonably ascertainable creditors.

⁶⁹ The \$25,000 figure is from Chapter 80-203, Laws of Florida. According to a calculation by the American Institute for Economic Research, using the Consumer Price Index calculated by the United States of America, Bureau of Labor Statistics, \$25,000 in 1980 equals \$52,123.79 in 2000. <http://www.aier.org>. The final sum of \$75,000 is in excess of the inflationary adjustment in order to account for the elimination of family administration.

⁷⁰ For minors, the parents are the natural guardians, s. 744.301(1), F.S. A minor may also have a guardian appointed by a court pursuant to Chapter 744, F.S.

Effect of Proposed Changes: Adds a requirement that, prior to entry of the order of summary administration, the petitioner must make a diligent search and reasonable inquiry for any known or reasonably ascertainable creditors, serve a copy of the petition on those creditors, and make provision for payment for those creditors to the extent that assets are available. Further provides that any known or reasonably ascertainable creditor who did not receive notice and for whom provision for payment was not made may enforce the claim, and must be awarded attorney's fees if the creditor prevails. Also, grammar and style changes are made. The liability of individual recipients of property subject to creditor claims is made pro-rata.

Section 182 -- Amends s. 735.2063, F.S., regarding notice to creditors.

Present Situation: Section 735.2063, F.S., provides that any person who has obtained an order of summary administration may publish a notice to creditors. If a notice to creditors is published, all creditor claims not filed within 3 months of the first publication are then barred.

Effect of Proposed Changes: Amends s. 735.2063, F.S., to specify that the publication of a notice to creditors will only bar the claim of a creditor that was not known or reasonably ascertainable. The changes to s. 735.206, F.S., in this act, require that a notice to creditors be furnished to all known and reasonably ascertainable creditors of the decedent. Also, grammar and style changes are made.

Section 183 -- Repeals s. 735.209, F.S., regarding joinder of heirs, devisees, or surviving spouse in summary administration. These provisions are moved to s. 735.203, F.S.

Part III of Chapter 735, F.S. Disposition of Personal Property Without Administration

Section 184 -- Amends s. 735.301, F.S., regarding disposition without administration, making grammar and style changes only.

Section 185 -- Amends s. 735.302, F.S., regarding income tax refunds in certain cases.

Present Situation: Where the United States Treasury Department determines that an overpayment of federal income tax exists and the person in whose favor the overpayment is determined is dead at the time the overpayment of tax is to be refunded, regardless of whether the decedent had filed a joint and several or separate income tax return, the amount of the overpayment, if not in excess of \$500, may be refunded directly to the surviving spouse on his or her verified application; or, if there is no surviving spouse, to one of decedent's children who is designated in a verified application purporting to be executed by all of the decedent's children over the age of 14 years. The application must show that the decedent was not indebted, that provision has been made for the payment of the decedent's debts, or that the entire estate is exempt from the claims of creditors under the constitution and statutes of the state, and that no administration of the estate, including summary administration, has been initiated and that none is planned, to the knowledge of the applicant. Section 735.302, F.S., is a method of paying a tax refund to the spouse or children of a deceased without requiring administration of the estate.

Effect of Proposed Changes: Increases from \$500 to \$2,500⁷¹ the tax refund amount under which the simplified procedure of s. 735.320, F.S., may be utilized. Establishes that the surviving spouse is the owner of such refund. Also, grammar and style changes are made.

Chapter 737, F.S. Trust Administration⁷²

Part II: Jurisdiction of Courts

Section 186 – Creates s. 737.208, F.S., regarding administration pending outcome or contest or other proceeding.

Present Situation: Section 733.812, F.S., provides that a distributee of property from an estate is liable to the estate for the value of any property improperly distributed to the distributee. Section 733.609, F.S., provides that the personal representative of an estate is liable to the estate for the value of any improper distribution. An interested party harmed by an improper distribution may enforce this obligation against the personal representative. Creditors have three months from service of the notice to creditors within which to file a claim; and thus personal representatives will generally refuse to make a distribution until after the claims filing deadline.

Effect of Proposed Changes: Creates new s. 737.208, F.S., regarding trusts, which provides that, pending the outcome of a proceeding filed to determine the validity of all or part of a trust or the beneficiaries of all or part of a trust, a trustee must proceed with the administration of the trust as if no proceeding had been commenced, except that no distribution may be made to a beneficiary in contravention of the rights of those persons that may be affected by the outcome of the proceeding. Upon motion of a party and after notice to interested persons, a court may, upon good cause shown, may authorize the trustee to distribute trust assets to a beneficiary subject to any conditions the court, in its discretion, may impose, including the posting of bond by the beneficiary.

Part III: Duties and Liabilities of Trustees

Section 187 -- Amends s. 737.3054, F.S., regarding trustee's duty to pay expenses and obligations of grantor's estate, making grammar and style changes only.

Section 188 -- Amends s. 737.306, F.S., regarding personal liability of trustee.

Present Situation: Section 737.306, F.S., provides that a trustee of a trust is generally not liable for debts of the trust, and provides exceptions to that limitation of liability. Subsection (4) mirrors

⁷¹ The \$500 figure was enacted in 1974. According to a calculation by the American Institute for Economic Research, using the Consumer Price Index calculated by the United States of America, Bureau of Labor Statistics, \$500 in 1974 equals \$1,742.39 in 2000. <http://www.aier.org>.

⁷² The bill proponents provided the following information regarding these trust provisions (September 17, 2000): "These changes are for the purpose of coordinating the provisions of the probate code and the trust law relating to claims against estates and trusts. Specifically, the changes follow the holding in *Tobin [v. Damian]*, 723 So.2d 396 (Fla. 4th DCA 1999)], which requires actions that depend on the decedent's liability be brought through the probate proceeding, and not directly against the trust or trustee. Also in the probate code and in Ch. 737, references have been made uniform throughout using the language now found in 733.707, "the expenses of the administration and obligations" of the decedent's estate. This has eliminated the troublesome term, "enforceable claims" referred to and partially defined in *Tobin*. Coordinated changes are included in several places in the probate code. These changes are a joint proposal of the Trust Law committee and the Probate Law Committee. Also, for uniformity throughout the trust law, as well as the Probate Code, the term, Grantor is substituted for Settlor. Grantor is a defined term in 731.201(17) and includes the term, Settlor. There are also grammatical and style changes."

the probate law by providing that, two years after the death of the settlor of a trust, the trust, the trustee, and beneficiaries, are not liable for debts of the settlor, with certain exceptions.

Effect of Proposed Changes: Moves subsection (4) to new s. 737.3061, F.S., with changes made therein.

Section 189 -- Creates s. 737.3061, F.S., regarding limitations on actions against certain trusts.

Present Situation: Section 737.306(4), F.S., mirrors the general probate law by providing that, two years after the death of the settlor of a trust, the trust, the trustee, and beneficiaries, are not liable for claims against the settlor of the trust. This bar does not apply to a creditor who has timely filed a claim against the settlor's estate and whose claim has not been paid or otherwise disposed of, even if the settlor's probate proceedings have been closed or otherwise completed. This bar does not affect the lien of a duly recorded mortgage or security interest or the right to foreclose and enforce the mortgage or lien.

Section 733.707(3), F.S., provides that a revocable trust owned by a decedent is liable for the expenses of the administration of the decedent's estate and is liable for "enforceable claims" of the decedent's creditors to the extent the decedent's estate is insufficient to pay them. In *Tobin v. Damian*, 723 So.2d 396 (Fla. 4th DCA 1999), the court ruled that a claim against a decedent who was a grantor of a revocable trust could not be filed directly against the trust, but had to be filed in the probate case of the decedent. See also, *Estate of Read v. A.D.K. Properties*, 766 So.2d 393 (Fla. 2nd DCA 2000).

Effect of Proposed Changes: Creates new s. 737.3061, F.S., regarding limitation on actions against certain trusts, based on s. 737.306(4), F.S. Following the holdings in *Tobin* and *Read*, a creditor of a decedent may not file a direct action against a revocable trust, or the trustee or any beneficiary of the trust. Rather, any claim against the decedent is to be filed in the probate of the decedent; and the personal representative may then determine whether to seek to surcharge the revocable trust. A trust may still be named in an action that is not dependent on the individual liability of the grantor.

Section 190 -- Amends s. 737.308, F.S., regarding notice of trust.

Present Situation: Section 737.308, F.S., requires that, upon the death of settlor of a revocable trust, the trustee file a notice of trust with the court of the county of the settlor's domicile and with the court having jurisdiction of the settlor's estate. The clerk must treat the notice of trust like a caveat. Subsection (6) provides that the trustee of the revocable trust is an interested party in the estate. Section 731.201(21), F.S., which defines "interested person", also provides that the trustee of a revocable trust that the decedent was a settlor of is an interested person.

Effect of Proposed Changes: Deletes subsection (6) as superfluous. Also, grammar and style changes are made.

Miscellaneous Statutes

Section 191 -- Amends s. 215.965, F.S., regarding disbursement of state moneys, changing a cross-reference affected by other changes contained in this act.

Section 192 -- Amends s. 660.46, F.S., regarding substitution of fiduciaries, changing a cross-reference affected by other changes contained in this act.

Section 193 -- Amends s. 737.111, F.S., regarding execution requirements for express trusts, changing a cross-reference affected by other changes contained in this act.

Other

Section 194 – Contains directions to the Division of Statutory Revision to change titles in the Probate Code.

Section 195 – Provides an effective date of January 1, 2002. Further provides that, as to the effective date, the substantive rights of all persons that have vested prior to January 1, 2002, are determined as provided in former chapters 63, 215, 409, 660, and 731-737, F.S., as those rights existed prior to January 1, 2002. The procedures for the enforcement of substantive rights which vest prior to January 1, 2002, shall be as provided in this act, except that any Family Administration filed before January 1, 2002, may be completed as a Family Administration. The effective date language is similar to that used when the Probate Code was last substantially amended in 1972.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The State Courts Administrator stated that HB 137 would have an indeterminate impact on expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Agency for Health Care Administration did not provide fiscal impact information regarding this bill.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This act does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This act does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This act does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The Probate Rules Committee, organized by the judiciary, reviews the Probate Rules annually. Typically, the committee meets in the Spring and Summer, and proposes changes that, if adopted by Supreme Court, are published in the Fall of that year. The effective date was selected to allow sufficient time for the rules committee to examine the changes and to suggest any necessary rule changes, the publishers of standard forms sufficient time to modify forms as necessary, and the proprietors of specialty software sufficient time to modify their products.⁷³

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 6, 2001, the Committee on Judicial Oversight adopted 7 amendments to HB 137. Those amendments:

1. Chapter 99-343, Laws of Florida, substantially amended the elective share laws. The effective date for those changes is October 1, 2001. The date was intentionally set far in advance in order for estate planners to absorb the changes and to give ample time to review the 1999 for errors and omissions. This amendment is the result of that review. Specifically, the amendment:
 - Section 732.2025(8), F.S., defines a “qualifying special needs trust” or “supplemental needs trust” as a trust established for an *ill* or disabled surviving spouse. This amendment deletes “ill”; a trust for a disabled surviving spouse may still be a qualifying special needs trust or supplemental needs trust.

⁷³ Telephone conference with Rohan Kelley, on November 28, 2000.

- Section 732.2025(8), F.S., defines a “qualifying special needs trust” or “supplemental needs trust” as a trust established for particular surviving spouses, which trust was established with court approval before or after a decedent’s death, if certain conditions are met. The requirement for court approval and the limitation on ineligible family trustees does not apply if the aggregate of the trust property as of the applicable valuation date in a qualifying special needs trust is less than \$100,000. This amendment deletes the exception regarding ineligible family trustees, clarifies that the \$100,000 is the aggregate total of the assets in all trusts established by a decedent, and specifies that value is determined on the applicable valuation date defined at s. 732.2095(1)(a), F.S.
- Section 732.2035(2), F.S., provides that property included when calculating the amount of the elective estate includes the decedent’s ownership interest in accounts or securities registered in “Pay On Death,” “Transfer On Death,” “In Trust For,” or coownership with right of survivorship form. For this purpose, “decedent’s ownership interest” means that portion of the accounts or securities which the decedent had, immediately before death, the right to withdraw or use without the duty to account to any person. This amendment provides that, in the case of accounts or securities held in tenancy by the entirety, only one half of the value the account or security is used in calculating the amount of the elective estate.
- Section 732.2035(5)(a), F.S., provides that property included when calculating the elective estate includes certain property transferred by the decedent to the extent that at the time of the decedent’s death the decedent possessed the right to, or in fact enjoyed the possession or use of, the income or principal of the property; or the principal of the property could, in the discretion of any person other than the spouse of the decedent, be distributed or appointed to or for the benefit of the decedent. A right to payments from an annuity or under a similar contractual arrangement is treated as a right to that portion of the income of the property necessary to equal the annuity or other contractual payment. This amendment adds that a right to payments under an annuity, *an annuity trust*, or *a unitrust*, or a similar arrangement is treated as a right to that portion of the income of the property necessary to equal the annuity or other contractual payment. An “annuity trust” is “a form of trust calling for payment of a fixed amount of income regardless of the amount of principal.”⁷⁴ A “unitrust” is a “trust from which a fixed percentage of the net fair market value of the trust’s assets, valued annually, is paid each year to the beneficiary.”⁷⁵
- Section 732.2045(1), F.S., lists 8 types of property that are excluded when calculating the elective estate. This amendment adds “property which constitutes the protected homestead of the decedent whether held by the decedent or by a trust at the decedent’s death” as a type of property excluded when calculating the elective estate. This change removes a decedent’s homestead from the elective estate, provided the homestead is titled either in the decedent’s name or is held by the decedent’s revocable trust. A home titled as tenants by the entireties will be included at half value and that half will count against the spouse’s elective share right. A spouse’s life estate interest in the homestead will not satisfy any of the elective share right since only property interests included in the elective estate count against the spouse elective share amount.
- Section 732.2055, F.S., defines the “value” of property for purposes of calculating the total value of the elective estate. Subsection (5) provides the general rule on valuation of property, providing that the fair market value of the property on the date of the decedent’s death is the measure of value, minus claims other than funeral expenses that are payable

⁷⁴ Black’s Law Dictionary, 6th edition.

⁷⁵ *Id.*

from the elective estate, and minus mortgages and liens encumbering property. This amendment removes the exception for funeral expenses, thus providing that funeral expenses are deducted from the gross value of the property in calculating the net of elective estate.

- Section 732.2075, F.S., provides the order in which estate assets are apportioned to satisfy payment of the elective share should the surviving spouse make the election to take the elective share. A property interest in which a charitable deduction is allowable under the gift tax laws may not be used to pay the elective share. This amendment defines “protected charitable lead interest”, and provides that, in certain circumstances, a charitable interest may be subject to a claim for the elective share.⁷⁶
 - Section 732.2085, F.S., provides for the liability of direct recipients and beneficiaries of property subject to the elective share. This amendment adds a conforming cross-reference necessary because of the change to s. 732.2055(5), F.S.
 - Section 732.2095(1)(a), F.S., defines the “applicable valuation date” for different forms of property subject to the elective share. The applicable valuation date under s. 732.2095(1)(a)6., F.S., is the date of the decedent’s death. This amendment provides that this date is applicable to property under s. 732.2035(2), F.S. (pay on death accounts or securities), and is not applicable to property under s. 732.2035(4), F.S. (transfer of certain property to a revocable trust).
 - Section 732.2095(2)(c), F.S., provides that if the spouse is a beneficiary of a qualifying special needs trust, the principal value of the trust is used in calculating the elective estate and elective share. Section 732.2095(2)(d), F.S., provides that if the spouse is the beneficiary of a trust that does not meet the requirements of an elective share trust, the value of the interest in the trust is the transfer tax value of the interest. A qualifying special needs trust may qualify under both, with different results. This amendment provides that a qualifying special needs trust is valued under paragraph (c), not paragraph (d).
 - Section 732.2105(2), F.S., provides that, if the elective share election is made, the balance of the estate, after payment of the elective share, is administered as though the surviving spouse had predeceased the decedent. This amendment deletes subsection (2) as unnecessary.
2. Section 732.515, F.S., provides that a will may refer to a written statement or list that provides for the disposition of specific items of personal property. The list must be signed by the testator, and may be changed or amended at any time without affecting the validity of the will. This amendment provides that, if more than one list exists, then, to the extent of any conflict among the lists, the provisions of the most recent list are deemed to revoke the inconsistent provisions of a prior list.
 3. Section 733.106(3), F.S., as originally changed by this bill, perhaps required the payment of all attorney’s fees charged by an attorney to an estate, without court supervision and control. This amendment maintains current law that all professional fees are subject to supervision and control by the probate court.

⁷⁶ Proponents of this amendment explain that this amendment “closes a loophole under the original [elective share] statute that permitted wholesale evasion of elective share through a short term inter vivos charitable lead trust. Under the original statute, the elective share could not be collected from a trust which qualified for a gift tax charitable deduction. That remains true of so-called charitable remainder trusts, even under the proposed revision. But, with respect to lead trusts, the revision will not permit collection from them but only after the charity’s interest has expired.” Memo from Pete Dunbar, Esquire, of February 2, 2001.

4. Section 733.310, created by this bill, requires that a personal representative who is no longer "entitled to" appointment must notify interested parties of the event that perhaps makes the person no longer qualified to be a personal representative. This amendment changes "entitled to" to "qualified for" appointment as personal representative, as no person is ever entitled to be appointed as a personal representative.
5. Section 733.613(3), created by this bill, provides that, in a sale or mortgage which occurs under a specific power to sell or mortgage real property, or under a court order authorizing or confirming that act, the purchaser or lender take title free of claims of creditors of the estate and entitlements of estate beneficiaries. This amendment provides that a mortgage or other lien against the real property existing on the date of sale or mortgage are not affected by the sale or mortgage.
6. This bill provides that the jurisdictional limit for Summary Administration is increased from \$25,000 to \$50,000. This amendment increases the jurisdictional limit of Summary Administration to \$100,000.
7. This bill creates s. 733.2121, which section creates and defines the notice to creditors of a pending probate case. In conjunction with the Medicaid Estate Recovery Act, s. 409.9101, F.S., this bill provides that the Agency for Health Care Administration must be furnished a copy of the notice to creditors if the decedent was 55 years of age or older at the time of death, and was not survived by a spouse, a child under 21 years of age, or a child who is blind or permanently and totally disabled pursuant to the eligibility requirements of Title XIX of the Social Security Act. This amendment changes the notice requirement to require that the estate of all decedents who were 55 years of age or older at the time of death must furnish a notice to creditors to the Agency for Health Care Administration.

On March 7, 2001, the Committee on Banking adopted five amendments:

Amendment No. 1 creates a cross reference between the banking code (s. 655.936, F.S.) and the probate code (s. 733.6065, F.S.) relating to procedures for opening, examining, and delivering the contents of a safe deposit box after the death of the lessee.

Amendment No. 2 completes the cross reference established in amendment no. 1, above, as between the probate code (s. 733.6065, F.S.) and the banking code (s. 655.936(2) and s. 655.935, F.S.), relating to procedures for opening, examining, and delivering the contents of a safe deposit box after the death of the lessee.

Amendment No. 3 permits a trustee to proceed with the administration of a trust pending the outcome of a proceeding to determine the validity of all or part of the trust, except no distribution may be made to any beneficiary. The amendment also provides judicial authority to order distribution upon good cause shown and the posting of a bond.

Amendment No. 4 increases the current statutory cap on the value of an estate that is permitted to undergo summary administration, from \$25,000 to \$75,000. A previous amendment had increased the jurisdictional amount to \$100,000, and the bill had originally proposed \$50,000.

Amendment No. 5 clarifies s. 732.107, F.S., so that the ten-year statute of limitation for claiming property escheated to the state begins to run at the time the state receives the property. In addition, this section eliminates the requirement that interest be added to an amount that is the result of a claimant's successful action asserting rights to escheated property. In addition, Certified Public Accountants are

added to the list of entities entitled to receive escheated funds (currently only attorneys and private investigative agencies are so permitted). This amendment conforms this section of the bill to the Unclaimed Property bill regarding the same section of the Florida Statutes (HB 107 by Representative Prieguez).

The bill was then reported favorably, as amended.

On March 22, 2001, the Council on Smarter Government adopted 6 amendments, numbered 13 through 18, as follows:

13. Changes the time within which AHCA may amend its claim from 6 months after the service of the notice to creditors, to one year after the last date medical services were rendered to the decedent.
14. Removes other changes to the Medicaid Estate Recovery Act.
15. Provides that the extension of statutes of limitation for an estate does not create an outside limit.
16. Changes the term "beneficiary" to "devisee".
17. Changes the term "settlor's" to "grantor's".
18. Changes the term "settlor" to "grantor".

The bill was then reported favorably as a council substitute.

On April 26, 2001, the House adopted two amendments to CS/HB 137, regarding the elective share sections of this act. The first amendment:

- Changes the effective date of the elective share provisions of this act to October 1, 2001, to match the effective date of ch. 99-343, L.O.F. (the remainder of the bill has an effective date of January 1, 2002).
- Modifies the provisions in s. s. 732.2075, F.S., regarding the sources from which the elective share is payable, to modify the new Class 4, to provide that it is "recipients of protected charitable lead interests, but only to the extent and at such times that contribution is permitted without disqualifying the charitable interest in that property for a deduction under the United States gift tax laws." This change eliminates a potential loophole
- Additionally, two definitions applicable only to the four classes are added. This act defines a "protected charitable interest" as "any interest for which a charitable deduction with respect to the transfer of the property was allowed or allowable to the decedent or the decedent's spouse under the United States gift tax laws"; and defines a "protected charitable lead interest" as "a protected charitable interest where one or more deductible interests in charity precede some other nondeductible interest or interests in the property."

The second amendment is identical to the first amendment, except that it adds a new subsection (6) to s. 732.2155, F.S., to provide that the elective share changes embodied in ch. 99-343, L.O.F., and in this act, to do not affect any interest in property held, as of the decedent's death, in a trust, whether revocable or irrevocable, if the property was an asset of the trust at all times between October 1, 1999 and the date of the decedent's death; the decedent was not married to the decedent's surviving spouse

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when the property was transferred to the trust; and the property was a nonmarital asset immediately prior to the decedent's death.

Both of the amendments adopted April 26, 2001, were engrossed into the bill, thus creating duplicative sections. On April 30, 2001, the House adopted a technical amendment that removed the duplication and thereby corrected the engrossing error.

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Nathan L. Bond, J.D.

Staff Director:

Lynne Overton, J.D.

AS REVISED BY THE COMMITTEE ON BANKING:

Prepared by:

Michael A. Kliner

Staff Director:

Susan F. Cutchins

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