

STORAGE NAME: h1127a.jo.doc
DATE: February 12, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 1127
RELATING TO: Probate & Trusts
SPONSOR(S): Representative Negron
TIED BILL(S): none

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

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

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

This bill allow a decedent's surviving spouse to satisfy his or her elective share out of property interests that are contingent on the surviving spouse taking under the elective share, to the extent that including such interests in the elective share does not diminish any other interests that would satisfy the elective share.

This bill makes clear that the presumption of undue influence by an actively involved substantial beneficiary under a will, who is in a fiduciary or confidential relationship with the testator, is a policy-based shifting of the burden of proof.

This bill provides that that an early claim against an estate is not time-barred.

Finally, this bill requires that any trust instrument creating a trust in which the grantor of the trust retains a right of revocation "must contain a notice that the trustee may have duties and responsibilities in addition to those described" in the trust instrument.

There are constitutional and other concerns regarding this bill. See Section V. Comments herein.

This bill does not appear to have a fiscal impact on state or local governments.

On February 12, 2002, the Committee on Judicial Oversight adopted one amendment to this bill. This amendment clarifies when certain notice requirements must be made, adds to the list of persons who are bound by certain actions or documents in trust administration, and provides for the creation of honorary trusts for the care of pets.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input 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 checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input 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: This bill requires particular language to be included in certain types of trust instruments.

B. PRESENT SITUATION:

See Section-by-Section Analysis.

C. EFFECT OF PROPOSED CHANGES:

See Section-by-Section Analysis.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. amending s. 732.2075, F.S., regarding a surviving spouse's elective share

Present Situation. Section 732.201, F.S., provides that "[t]he surviving spouse of a person who dies domiciled in Florida has the right to a share of the elective estate of the decedent ... to be designated the elective share." A decedent's elective estate includes his or her probate estate, plus numerous fractional, future or contingent ownership interests, and a limited category of former interests.¹ A surviving spouse's elective share is defined as 30% of the decedent's elective estate.²

In the absence of any contrary provision in the decedent's will or in a trust referred to in the decedent's will, s. 732.2075, F.S., specifies the priority of sources from which to pay a surviving spouse's elective share. In order, these are

(a) To the extent paid to or for the benefit of the surviving spouse, the proceeds of any term or other policy of insurance on the decedent's life if, at the time of decedent's death, the policy was owned by any person other than the surviving spouse.

(b) To the extent paid to or for the benefit of the surviving spouse, amounts payable under any [pension, retirement, deferred compensation or similar plan].

(c) To the extent paid to or for the benefit of the surviving spouse, the decedent's one-half of any property [covered by the Florida Uniform Disposition of Community Property Rights at

¹ See s. 732.2035, F.S. (defining "[p]roperty entering into elective estate.")

² See s. 732.2065, F.S.

Death Act, ss. 732.216-732.228, F.S., or that is real property defined as community property by the jurisdiction it is located in].

(d) Property held for the benefit of the surviving spouse in a qualifying special needs trust.

(e) Property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse.

(f) Property interests that would have satisfied the elective share any preceding paragraph of this subsection but were disclaimed.

Effect of Proposed Changes. This bill amends s. 732.2075(1)(e), F.S., so that that paragraph includes interests that are contingent on the surviving spouse making the election in favor of the elective share as opposed to taking under the decedent's will (or under statutory intestacy,³ as the case may be). However, this bill includes these contingent interests in paragraph (e) "only to the extent that such contingent interests do not diminish other property interests that would be applied to satisfy the elective share in the absence of the contingent interests."

Section 2. amending s. 733.107, F.S., regarding presumptions and burdens of proof in will contests

Present Situation. The Florida Evidence Code, ch. 90, F.S, defines presumptions and their effects. "[A] presumption is an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established."⁴ Section 90.302, F.S., specifies that

[e]very rebuttable presumption is either:

(1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or

(2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the fact.

A presumption that serves "primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy," shifts only the burden of producing evidence.⁵ Such a presumption is called a "vanishing presumption" because any evidence to rebut the presumption eliminates the presumption from the proceeding altogether.⁶ Any other presumption (*i.e.*, a presumption that does serve primarily to implement public policy) shifts the burden of proof, and therefore does not "vanish" upon production of rebuttal evidence.⁷

Section 733.107, F.S., currently reads:

In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. Thereafter, the contestant shall

³ See ss. 732.101-732.111, F.S.

⁴ Section 90.301(1), F.S.

⁵ Section 90.303, F.S.

⁶ *Insurance Co. of Pennsylvania v. Guzman's Estate*, 421 So.2d 597, 601 (Fla. 4th DCA 1982).

⁷ See s. 90.304, F.S. See also *Caldwell v. Division of Retirement*, 372 So.2d 438 (Fla. 1979).

have the burden of establishing the grounds on which the probate of the will is opposed or revocation sought.

Under longstanding case law, there is a presumption that a will was procured by undue influence when a person in a fiduciary or confidential relationship with the testator was active in preparing or executing the will and that person is a substantial beneficiary under the will.⁸ The Supreme Court of Florida first expounded this doctrine in the 1941 case of *In re Aldrich's Estate*,⁹ where it held that this presumption shifts the burden of proof. Thirty years later, in *In re Estate of Carpenter*,¹⁰ the Court reversed itself and ruled that the presumption shifts only the burden of producing evidence.

In 1976, the Legislature enacted the Florida Evidence Code, which became effective on July 1, 1979.¹¹ Since then, courts have divided over whether the Evidence Code legislatively overrules *Carpenter* by making the presumption of undue influence shift the burden of proof.¹²

Effect of Proposed Changes. This bill amends s. 733.107, F.S., to make clear that the presumption of undue influence by an actively involved substantial beneficiary who is in a fiduciary or confidential relationship with the testator is a policy-based shifting of the burden of proof. This ensures that the presumption does not "vanish" upon production of rebuttal evidence by the proponent of the will.

Section 3. amending s. 733.702, F.S.

Present Situation. The personal representative of a decedent is required to publish notice to the decedent's creditors once a week for two consecutive weeks, and to serve notice on the decedent's creditors if reasonably possible.¹³ For claims against a decedent to survive the decedent's death and be transferred to his or estate, and for certain expenses directly related to the decedent's death to attach to his or her estate, the decedent's creditors must file in the probate proceeding within a statutory claims period or be barred from pursuing the claim.¹⁴ This period is provided by the "statute of nonclaim," s. 733.702(1), F.S., which presently reads:

If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death of the decedent, including claims of the state and any of its subdivisions, even if the claims are unmatured, contingent, or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative; and no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent, is binding on the estate, on the personal representative, or on any beneficiary unless filed in the probate proceeding within the later of 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor, even though the personal representative has recognized the claim or demand by paying a part of it or interest on

⁸ See *Cripe v. Atlantic First Nat'l Bank*, 422 So.2d 820 (Fla. 1980); *Zinnser v. Gregory*, 77 So.2d 611 (Fla. 1955); *In re Palmer's Estate*, 48 So.2d 732 (Fla. 1950). See generally Judge John E. Fennelly, *Up From Carpenter: Undue Influence in Will Contests*, 16 NOVA L. REV. 515 (1991).

⁹ 3 So.2d 856 (Fla. 1941).

¹⁰ 253 So.2d 697 (Fla. 1971).

¹¹ See s. 1, ch. 76-237, L.O.F.

¹² See, e.g., *Estate of Brock*, 692 So.2d 907 (Fla. 1st DCA 1996); *Gorman v Harrison*, 559 So.2d 643 (Fla. 3d DCA 1990); *Thomas for Fennell v. Lampkin*, 470 So.2d 37 (Fla. 5th DCA 1985); *In re Estate of Davis*, 462 So.2d 12 (Fla. 4th DCA 1984) ("*Davis II*"); *In re Estate of Davis*, 428 So.2d 774 (Fla. 4th DCA 1983) ("*Davis I*"); *Jordan v. Noll*, 423 So.2d 368 (Fla. 1st DCA 1983).

¹³ See s. 733.2121, F.S.

¹⁴ See s. 733.702(2), F.S.

it or otherwise. The personal representative may settle in full any claim without the necessity of the claim being filed when the settlement has been approved by the interested persons.

The Supreme Court of Florida has ruled that requiring claims to be filed "within" the statute of nonclaim's specified time-frame effectively bars claims that are filed early, *i.e.*, claims filed before a decedent's personal representative publishes or serves the statutorily required notice to creditors.¹⁵

Effect of Proposed Changes. This bill amends s. 733.702(1), F.S., to change the filing deadline to "on or before" the specified dates, rather than "within." Thus, an early claim is not time-barred. Also, grammar and style changes are made.

Section 4. creating s. 737.115, F.S., regarding notice of a trustee's duties in a trust instrument

Present Situation. Section 733.707(1), F.S., breaks down "the expenses of the administration and obligations of [a] decedent's estate" into eight classes and specifies the order among those classes in which a decedent's personal representative must pay those claims. In addition, s. 733.707, F.S., further provides, in pertinent part:

(2) After paying any preceding class, if the estate is insufficient to pay all of the next succeeding class, the creditors of the latter class shall be paid ratably in proportion to their respective claims.

(3) Any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (e), either alone or in conjunction with any other person, is liable for the expenses of the administration and obligations of the decedent's estate to the extent the decedent's estate is insufficient to pay them as provided in s. 733.607(2).

...

(e) For purposes of this subsection, a "right of revocation" is a power retained by the decedent, held in any capacity, to:

1. Amend or revoke the trust and revest the principal of the trust in the decedent; or
2. Withdraw or appoint the principal of the trust to or for the decedent's benefit.

Section 733.607(2), F.S., entitles the personal representative of a decedent's estate to payment of any insufficiency in satisfying claims against the estate from the trustee of any trust granted by the decedent in which the decedent retained a right of revocation.

Chapter 737, F.S., entitled "Trust Administration," contains all of Florida's statutory requirements with respect to the basic form of trusts (and of the trust instruments creating them).

Effect of Proposed Changes. This bill creates a new s. 737.115, F.S. This new section requires that any trust instrument creating a trust in which the grantor of the trust retains a right of revocation "must contain a notice that the trustee may have duties and responsibilities in addition to those described" in the trust instrument.

The new s. 737.115, F.S., also provides a model version of this new notice, although the new section does not require conformity with the model notice. The statutory model notice reads:

¹⁵ See *May v. Illinois Nat. Ins. Co.*, 771 So.2d 1143 (Fla. 2000).

“The trustee of a trust may have duties and responsibilities in addition to those described in the instrument creating the trust. If you have questions you should obtain legal advice.”

In addition, new s. 737.115, F.S., provides that absence of the notice required by the new section from a trust instrument does not affect a trust’s validity, nor does absence of the notice relieve a trustee from any duties. Finally, the new section provides that no one is liable for failing to include in a trust instrument the notice that the section requires.

Section 5. Providing an effective date of upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues in the aggregate.

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

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Article V., s. 2(a), Fla. Const., provides that the "Supreme Court shall adopt rules for the practice and procedure in all courts." This bill's shifting of the burden of proof in will contests may raise concerns under this provision.

Florida courts protect their rulemaking power by striking down laws that conflict with their rules. For example, in 1976, the Florida Supreme Court ruled unconstitutional a statute regarding the state mental hospital because it was in conflict with a previously passed criminal rule of procedure regarding persons found not guilty by reason of insanity.¹⁶ In 1991, the Court ruled that a statute requiring mandatory severance of a mortgage foreclosure trial from a trial on any other counterclaims was unconstitutional because it conflicted with an existing rule of civil procedure.¹⁷

Essentially, the rule is that substance is legislative and procedure is judicial. In practice, determining the difference is not simple or clear. In 1973, Justice Adkins described the difference between substance and procedure in this way:

The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.¹⁸

This "twilight zone" remains to this day, and causes in the analysis of many enactments a difficult determination of whether a matter is procedural or substantive.

In the administrative context of worker's compensation, Florida courts have consistently held that burdens of proof are procedural rather than substantive.¹⁹ At the opposite extreme, in the criminal context, the Supreme Court of the United States has held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires proof of a defendant's guilt beyond a reasonable doubt; moreover, this requirement applies to juvenile proceedings even if they are technically "civil."²⁰ The Supreme Court of Florida has held that criminal statutes of limitations

¹⁶ See *In re Connors*, 332 So.2d 336 (Fla. 1976).

¹⁷ See *Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So.2d 730 (Fla. 1991).

¹⁸ *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).

¹⁹ See *Sullivan v. Mayo*, 121 So.2d 424 (Fla. 1960); 57 FLA. JUR. 2d WORKERS' COMPENSATION § 12 and authorities cited therein.

²⁰ See *In re Winship*, 397 U.S. 358 (1970).

are substantive,²¹ but strongly suggested that civil statutes of limitations are procedural.²² It is therefore possible that a court might determine burdens of proof in will contests to be either substantive or procedural.

However, even if a court held that burdens of proof in will contests are procedural, that court might not strike down this bill's shifting of the burden of proof with respect to the presumption of undue influence. Despite treating it as procedural, the Supreme Court of Florida in *Kalway v. Singletary*²³ nonetheless upheld a thirty-day statute of limitations for the filing of an action challenging a prisoner disciplinary proceeding. In discussing the separation of powers issue, the Court said:

As a practical matter, the Court on occasion has deferred to the expertise of the legislature in implementing its rules of procedure. See, e.g., *Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 667 So.2d 195, 195 (Fla.1996) (noting that the need for juvenile detention shall be made "according to the criteria provided by law" and explaining that these "include those requirements set out in section 39.042, Florida Statutes (1995)"); *In re Family Law Rules of Procedure*, 663 So.2d 1049, 1086 (Fla.1995) (setting forth amended rule 12.740, which provides that all contested family matters may be referred to mediation, "[e]xcept as provided by law"). The setting of an interim time frame for challenging the Department's disciplinary action following the exhaustion of intra-departmental proceedings is a technical matter not outside the purview of the legislature. We do not view such action as an intrusion on this Court's jurisdiction over the practice and procedure in Florida courts.²⁴

Given this bill's express legislative findings of public policy served by shifting the burden of proof with respect to the presumption of undue influence in will contests, it is possible that a court that treated this change as procedural would still defer to the Legislature. It is also possible that such a court would instead strike down the language that this bill adds to s. 733.107, F.S., as encroaching on the judiciary's rulemaking power.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

This bill requires notice in trust instruments that a trustee may have duties other than those in the instrument, yet expressly provides that there is no penalty to anyone for failing to meet this requirement.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 12, 2002, the Committee on Judicial Oversight adopted one amendment to this bill. This amendment clarifies that the notice requirements of 731.303(3), F.S., only apply to judicial proceedings, makes stylistic changes to the trust accounting provisions of 731.303(5), F.S., and specifies that "[a]ll persons who may take by virtue of, and whose interests are subject to, the exercise or non-exercise of [a] power [of amendment or revocation] are also bound [by the trust accounting provisions of 731.303(5), F.S.], but only to the extent of their interests." This amendment also provides for honorary trusts for the care of pets.

²¹ See *Rubin v. State*, 390 So.2d 322 (Fla. 1980).

²² See *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000); *State ex rel. Butterworth v. Kenny*, 714 So.2d 404 (Fla. 1998).

²³ 708 So.2d 267 (Fla. 1998).

²⁴ *Id.* at 269.

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The Committee then reportedly this bill favorably, as amended.

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

David L. Jaroslav, J.D.

Nathan L. Bond, J.D.