

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1965 (PCB JU 04-18) Intestate Estates/Holocaust Victims  
**SPONSOR(S):** Committee on Judiciary and Rep. Kottkamp  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 2670

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	15 Y, 1 N	Jaroslav	Havlicak
2)			
3)			
4)			
5)			

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### SUMMARY ANALYSIS

Florida's Probate Code provides, among many other provisions, for intestate succession, i.e., how property is distributed among heirs when a decedent dies without leaving a valid will. Current law provides an extensive list of potential heirs, reaching to the descendants of the decedent's grandparents. However, if a decedent dies without any apparent surviving heirs entitled to succeed under the intestacy statute, the decedent's estate escheats to the state. The property must then be sold, with the proceeds to be paid to the Chief Financial Officer and deposited in the State School Fund. Up to ten years after the sale, a person claiming to be entitled to the proceeds may reopen administration of the estate and assert his or her claim; after ten years, the state's rights to the escheated proceeds become absolute.

This bill provides that if there are none of the listed groups of potential heirs and part of the normal family lineage of the intestate decedent cannot be documented because it includes a Holocaust victim, a probate court may extend the right of succession to other persons who the best available evidence shows are surviving heirs. This bill specifies that a petition by a person claiming to be such an heir may not be dismissed for failure to comply with an applicable statute of limitations or laches.

This bill further provides that a probate court may allow such a claimant to meet a reasonable, not unduly restrictive, standard to substantiate his or her claim, including a claim that a person's whereabouts are unknown as evidence of a decedent's death, if such claim is from a source that a reasonable person would accept as reliable in the conduct of his or her affairs.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h1965.u.doc  
**DATE:** April 19, 2004

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |   |  |   |
|--------------------------------------|---|--|---|
| 1. Reduce government?                | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/>            | N/A <input type="checkbox"/>            |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/>            | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 5. Empower families?                 | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/>            | N/A <input type="checkbox"/>            |

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

Because this bill would allow some intestate heirs to succeed outside the ordinary provisions of the intestacy statute, where the estate would typically escheat to the state, this bill could arguably be described as diminishing personal responsibility.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

Chapters 732-735, F.S., are Florida's Probate Code. Chapter 732, F.S., governs intestate succession and wills, and Part I of that chapter, ss. 732.101-732.111, F.S., specifically addresses intestate succession, i.e., how property is distributed among heirs when the decedent dies without leaving a valid will.

If there is no surviving lineal descendant (i.e., if there are no children) of the decedent, the spouse inherits the entire estate.<sup>1</sup> If there are surviving lineal descendants, all of whom are lineal descendants of the surviving spouse, then the spouse receives the first \$60,000 of the intestate estate, plus one-half of the balance of the intestate estate, valuation being calculated on fair market value as of the date of the decedent's death.<sup>2</sup> If there are surviving lineal descendants, at least one of whom is not a lineal descendant of the surviving spouse, then the spouse receives one-half of the intestate estate.<sup>3</sup>

Section 732.103, F.S., currently provides:

Share of other heirs.—The part of the intestate estate not passing to the surviving spouse under s. 732.102, or the entire intestate estate if there is no surviving spouse, descends as follows:

- (1) To the lineal descendants of the decedent.
- (2) If there is no lineal descendant, to the decedent's father and mother equally, or to the survivor of them.
- (3) If there is none of the foregoing, to the decedent's brothers and sisters and the descendants of deceased brothers and sisters.
- (4) If there is none of the foregoing, the estate shall be divided, one-half of which shall go to the decedent's paternal, and the other half to the decedent's maternal, kindred in the following order:
  - (a) To the grandfather and grandmother equally, or to the survivor of them.
  - (b) If there is no grandfather or grandmother, to uncles and aunts and descendants of deceased uncles and aunts of the decedent.
  - (c) If there is either no paternal kindred or no maternal kindred, the estate shall go to the other kindred who survive, in the order stated above.

<sup>1</sup> See s. 732.102(1), F.S.

<sup>2</sup> See s. 732.102(2), F.S.

<sup>3</sup> See s. 732.102(3), F.S.

(5) If there is no kindred of either part, the whole of the property shall go to the kindred of the last deceased spouse of the decedent as if the deceased spouse had survived the decedent and then died intestate entitled to the estate.

Under s. 732.107, F.S., if a decedent dies without any apparent surviving heirs entitled to succeed under the intestacy statute, the decedent's estate escheats to the state. The property must then be sold in accordance with the Florida Probate Rules, with the proceeds to be paid to the Chief Financial Officer and deposited in the State School Fund.<sup>4</sup> Up to ten years after the sale, a person claiming to be entitled to the proceeds may reopen administration of the estate and assert his or her claim; after ten years, the state's rights to the escheated proceeds become absolute.<sup>5</sup>

### **Proposed Changes**

This bill amends s. 732.103, F.S., to provide that if there are none of the listed groups of potential heirs and part of the normal family lineage of the intestate decedent cannot be documented because it includes a Holocaust victim,<sup>6</sup> a probate court may extend the right of succession to other persons who the best available evidence shows are surviving heirs. This bill specifies that a petition by a person claiming to be such an heir may not be dismissed for failure to comply with an applicable statute of limitations or laches.<sup>7</sup>

This bill further provides that a probate court may allow such a claimant to meet a reasonable, not unduly restrictive, standard to substantiate his or her claim, including a claim that a person's whereabouts are unknown as evidence of a decedent's death, if such claim is from a source that a reasonable person would accept as reliable in the conduct of his or her affairs.

#### **C. SECTION DIRECTORY:**

**Section 1.** Amends s. 732.103, F.S., relating to intestate succession.

**Section 2.** Provides an effective date of upon becoming law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

It is possible that this bill would reduce state revenues from the sale of escheated estate property. The fiscal impact, if any, is uncertain.

##### **2. Expenditures:**

It is possible that this bill would require the expenditure of additional funds to defend the state's claims to escheated estate property. The fiscal impact, if any, is uncertain.

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<sup>4</sup> See s. 732.107(2), F.S.

<sup>5</sup> See s. 732.107(3), F.S.

<sup>6</sup> A "Holocaust victim" is defined under this bill as "a person who disappeared or lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups or persons between 1900 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, or countries allied or cooperating with Nazi Germany."

<sup>7</sup> The equitable defense of laches is generally defined as "negligence or omission to assert a right seasonably, or an unexcused delay in asserting rights during a period of time in which adverse rights have been acquired under circumstances that would make it inequitable to displace such adverse rights." 35 FLA. JUR. 2D LIMITATIONS AND LACHES § 116 (citing *Cone v. Benjamin*, 27 So.2d 90. (Fla. 1946); *Sample v. Natalby*, 162 So. 493 (Fla. 1935)). Laches "differs from the defense of the statute of limitations, in that the statute of limitations defense is based solely on the passage of time, whereas the defense of laches also requires a change in the position of the parties due to the passage of time." *Id.*

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

It is possible that this bill would grant some persons intestate succession rights to estate property that they would not otherwise have. The economic impact, if any, is uncertain.

D. FISCAL COMMENTS:

See above.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

#### **Equal Protection**

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that a state may not “deny to any person within its jurisdiction the equal protection of the laws.” Article I, section 2 of the Florida Constitution further provides that “[a]ll natural persons ... are equal before the law.” Both the federal and state Equal Protection Clauses are designed to prevent any person or class of persons from being singled out as a target for arbitrary and unjust discrimination.<sup>8</sup> They do not require that all persons be treated identically but rather that the law apply equally to all persons who are similarly situated.<sup>9</sup>

In most cases, a governmental classification must merely be rationally related to a legitimate state purpose, i.e., reasonable classifications other than those involving suspect classes of persons or fundamental rights are generally permissible, so long as the classifications are not arbitrary and are based on some difference in the classes having a substantial relation to the purpose of the legislation.<sup>10</sup> A litigant could argue that there is no such relationship with respect to the classification in this bill, particularly if that litigant sought to claim proceeds of an escheated estate through descent from a victim of genocide or crimes against humanity other than the Holocaust.

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<sup>8</sup> See *Washington v. Davis*, 426 U.S. 229 (1976); *Haber v. State*, 396 So.2d 707 (Fla. 1981).

<sup>9</sup> See *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (“all persons similarly circumstanced shall be treated alike”)); *Duncan v. Moore*, 754 So.2d 708 (Fla. 2000).

<sup>10</sup> See, e.g., *Vacco v. Quill*, 521 U.S. 793 (1997); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Williams v. Pryor*, 229 F.3d 1331 (11th Cir. 2000); *State v. Muller*, 693 So.2d 976 (Fla. 1997); *Libertarian Party of Florida v. Smith*, 687 So.2d 1292 (Fla. 1996); *Lite v. State*, 617 So.2d 1058 (Fla. 1993).

## Federal Foreign Affairs Power

The Constitution of the United States allocates various powers in the field of foreign policy to Congress<sup>11</sup> or to the President,<sup>12</sup> and specifically denies some such powers to the states.<sup>13</sup> However, federal power over, and state exclusion from, the conduct of foreign relations is broader than these provisions. As the U.S. Supreme Court explained in *United States v. Pink*,<sup>14</sup> “[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively.”<sup>15</sup>

As an implication of this general principle, “even in [the] absence of a treaty” or federal statute, a state may violate the federal constitution by “establish[ing] its own foreign policy.”<sup>16</sup> Indeed, to condition the application of state law on the activities of a foreign country has been held “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”<sup>17</sup> It is possible that a court could find that this bill does attempt to do this, and is thus unconstitutional. Conversely, it is also possible that a court would find this bill’s provisions are not subversive of the federal foreign affairs power. This power is, in fact, “rarely invoked by the courts,”<sup>18</sup> in part because state law does not conflict with it merely by causing “some incidental or indirect effect in foreign countries.”<sup>19</sup>

However, even if this bill does not facially conflict with federal authority in the field of foreign policy, it is still possible that many individual claims asserted under its provisions may still be preempted by

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<sup>11</sup> See Art. I, s. 8, U.S. Const. (“Congress shall have Power To . . . regulate Commerce with foreign Nations, . . . establish an uniform Rule of Naturalization . . . define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . declare War, grant Letters of Marque and Reprisal, . . . raise and support Armies, . . . provide and maintain a Navy . . . [and] provide for calling forth the Militia to . . . repel Invasions[.]”)

<sup>12</sup> See Art. II, s. 2, U.S. Const. (“The President shall be Commander in Chief of the Army and Navy of the United States, . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . . [and] by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls[.]”) See also Art. II, s. 1, U.S. Const. (“The executive Power shall be vested in a President of the United States of America.”) Courts have held that, because this executive “vesting clause” does not use the phrase “herein granted,” as does the Congressional vesting clause of Article I, the executive power it refers to and grants is not necessarily limited to those powers later enumerated in the rest of Article II: in particular, it includes many of the “attributes of external sovereignty,” which are a source of some of the President’s primacy over Congress and especially over the judiciary in the conduct of foreign policy. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

<sup>13</sup> See Art. I, s. 10, U.S. Const. (“No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; . . . without the Consent of Congress, lay any Imposts or Duties on Imports or Exports . . . keep Troops, or Ships of War in time of Peace. . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”)

<sup>14</sup> 315 U.S. 203 (1942).

<sup>15</sup> *Id.* at 233. See also *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (“For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”) See generally Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT’L L. 832 (1989). But see generally Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

<sup>16</sup> *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

<sup>17</sup> *Id.* at 432.

<sup>18</sup> *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 752 (9th Cir. 2001). Despite this statement by the Ninth Circuit, however, exactly how rarely the federal foreign affairs power is a basis for finding state legislation unconstitutional in those cases where it actually arises may be an open question. Although the U.S. Supreme Court has not done so in more than 30 years, other courts have. See, e.g., *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (striking down the Massachusetts Burma Law, Mass. Gen. Laws ch. 7, §§ 22G-22M and 40F ½, which forbade state contracting with companies that did business in or with Burma); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (invalidating an Illinois statute which excluded South African coins from otherwise applicable state tax exemptions).

<sup>19</sup> *Clark v. Allen*, 331 U.S. 503, 517 (1947).

treaty—primarily by the peace treaties and associated protocols concluded by the United States with the defeated Axis powers at the end of World War Two, but also relating to claims arising out of both the war and the Holocaust that have been concluded since.<sup>20</sup>

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

**Evidentiary Standard**

This bill's evidentiary standard to substantiate a claim to intestate succession through a Holocaust victim may be unclear. The procedure a court may adopt for such claims is required by this bill to be both "reasonable" and "not unduly restrictive," and a court will likely interpret these requirements to be distinct from each other.<sup>21</sup> In addition, this bill authorizes the introduction of evidence of a decedent's death if from a source that a reasonable person would accept as reliable in the conduct of his or her affairs, but does not specify how this or other evidence may ultimately assert (or fail to assert) such a claim, i.e., this bill does not specify the burden of proof.<sup>22</sup>

**Definition of "Holocaust Victim"**

This bill's definition of "Holocaust victim" is extremely broad, and may reach parties it is not intended to cover, while possibly failing to reach some of those it is meant to reach. It is unclear, for example, why the definition reaches back to 1900 despite referring to Nazi Germany, since the Nazi party only assumed power in Germany in 1933. Additionally, while formal treaties of alliance are easily identifiable, whether a country was, at some point, "cooperating" with Nazi Germany may not be sufficiently defined (this may or may not cover, for example, Spain, Switzerland, Argentina or pre-1938 Austria), nor whether the loss of life or property required to be defined as a Holocaust victim must have taken place during the time period when the country in question was "allied or cooperating" with Nazi Germany. Further, while the definition clearly applies to Nazi Germany, to areas occupied by Nazi Germany and to countries allied or cooperating with Nazi Germany, it is unclear whether the definition applies to areas occupied by countries allied or cooperating with Nazi Germany (such as Japanese-occupied parts of China or Italian-occupied Ethiopia). Finally, it is unclear whether or to what extent the "discriminatory laws, policies, or actions" must have been expressly "targeted against discrete groups or persons," or whether they are merely required to have had discriminatory effect.

Depending on how the definition is construed, it is possible that it could reach, among others, for example: all, none or only some Chinese, Korean or Southeast Asian victims of the Japanese military; Baltic Germans in Lithuania, Latvia or Estonia but only if they lost their lives or property between August 1939 and June 1941 (while the Soviet Union was nominally a German ally); Serbs, Muslims and Albanians as well as Jews in Croatia under the Ustača, but possibly only Croatian Jews once the country was occupied by Germany; Jews in the German-occupied Netherlands but not in the Japanese-occupied Dutch East Indies; or Jews in German-occupied France but not in unoccupied "Vichy" France (or in the Vichy regime's overseas departments, such as Algeria).

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<sup>20</sup> Cf. *American Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003) (relying on, and extensively citing, treaties with Germany and Japan, as well as federal statutes, to hold that California's Holocaust Victim Insurance Relief Act, Cal. Ins. Code § 13804(a), was federally preempted).

<sup>21</sup> Courts assume that the Legislature adopts specific statutory language to achieve a particular purpose, i.e., that the addition, omission, or alteration of individual words is intentional and meaningful. See *Carlile v. Game & Fresh Water Fish Commission*, 354 So.2d 362 (Fla. 1977).

<sup>22</sup> It is possible that the Florida Supreme Court, exercising its constitutional authority to promulgate rules of practice and procedure, see Art. V, s. 2(a), Fla. Const., might adopt new provisions of the Florida Probate Rules to specifically govern claims on intestate estates descending from or through Holocaust victims clarifying the evidentiary standard. In the absence of such new provisions, the chief judges of individual courts might adopt local administrative orders governing the same subject.

**Effective Date**

It is not clear whether this bill's effective date of upon becoming law would bar anyone who has previously made such a claim as it allows for and had their petition dismissed from reasserting the same claim.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

None.