

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower families -- This bill may serve or benefit families who might potentially otherwise lose the right to property in an estate proceeding.

Provide limited government -- This bill appears to both increase and decrease procedural requirements in probate proceedings.

B. EFFECT OF PROPOSED CHANGES:

Background

Probate is the legal process for payment of the bills of the deceased, and distribution of the deceased's property to heirs. In general, the assets of the deceased are used first to pay the cost of the probate proceeding, than are used to pay the outstanding debts of the deceased, and the remainder paid to the heirs. If the deceased left a valid will, the estate is "testate", and the assets are distributed according to the will. If the deceased did not, the estate is "intestate", and the assets are distributed according to statute. There are two significant exceptions to these general rules. The concepts of homestead and exempt property transfer property to certain surviving dependents before such property is subject to being sold to pay creditors; and the elective share may provide a different inheritance for a surviving spouse than the spouse would otherwise receive by operation of the will and of probate law.

Commencement of Probate, Notice of Administration

A probate case is commenced by the filing of a Petition for Administration.¹ The court must appoint a personal representative, who is the person responsible to the court for collecting the assets of the deceased and transferring those assets to the creditors and heirs entitled to those assets. One of the first duties of the personal representative is to give notice to creditors and heirs of the existence of the probate proceeding and the appointment of the personal representative. This is accomplished by the publication and service of a Notice to Creditors, and by the serving of a Notice of Administration on the surviving spouse and beneficiaries.

Section 733.212, F.S., requires the personal representative to promptly serve a copy of the notice of administration upon the decedent's surviving spouse, beneficiaries, the trustee of any trust and each trust beneficiary, and persons who may be entitled to exempt property. The notice must:

- Provide the name of the decedent;
- List the file number of the estate, the designation and address of the court in which the proceedings are pending;
- Provide the name and address of the personal representative and the personal representative's attorney; and
- State that interested persons are required to file with the court any objection by an interested person on whom the notice was served that challenges the validity of the will, the qualifications of the personal representative, venue, or jurisdiction of the court within 3 months after the date of service of a copy of the notice of administration on the objecting person.

¹ Section 733.202, F.S.

Exempt Property

The Florida Probate Code provides that if a decedent was domiciled in Florida at the time of death, the surviving spouse, or if there is no surviving spouse, the children of the decedent, have the right to take certain property, which property is not subject to being sold to pay the claims of creditors. Such property is known as "exempt property".² Exempt property consists of:

- Household furniture, furnishings, and appliances in the decedent's usual place of abode, up to a net value of \$10,000 as of the date of death;³
- All automobiles held in the decedent's name and regularly used by the decedent or members of the decedent's immediate family as their personal automobiles;⁴
- Florida prepaid college program contracts purchased and Florida college savings agreements;⁵
- Death benefits for certain teachers and school administrators.⁶

Section 732.402, F.S., provides that persons entitled to exempt property are deemed to have waived their rights to such property unless (1) a petition for determination of exempt property is filed by or on behalf of the persons entitled to the exempt property within four months after the date of service of the notice of administration; or (2) within 40 days from the date of termination of any proceeding involving the construction, admission to probate, or validity of the will or involving any other matter affecting any part of the estate subject to the statute.⁷

Exempt property is in addition to protected homestead property. The entitlement to homestead property⁸ is automatic and decedent's surviving spouse or children are not required to file a petition of determination to receive the homestead property.

Elective Share

The surviving spouse of a person who dies domiciled in Florida has the right to elect to take a share of the estate of the decedent, known as the elective share,⁹ instead of the share of the estate provided for in the will or provided for in the laws of intestacy. The elective share is for the express purpose of caring for the surviving spouse.¹⁰ The elective share is 30% of the elective estate.¹¹ The elective share is reduced by the value of any property passing to the spouse in the decedent's will, under intestacy, or as a pretermitted spouse. The elective share is in addition to the spouse's right to exempt property, a family allowance, and homestead.¹²

Section 732.2135, F.S. provides that the elective share election must be filed within the earlier of (1) six months after the service of a copy of the notice of administration on the surviving spouse or attorney-in-fact or guardian of the property of the surviving spouse; or (2) two years after the decedent's death. An election may be withdrawn within eight months after the decedent's death, but before the court's order of contribution.

² Section 732.402(1), F.S.

³ Section 732.402(2)(a), F.S.

⁴ Section 732.402(2)(b), F.S.

⁵ Section 732.402(2)(c), F.S.

⁶ Section 732.402(2)(d), F.S.

⁷ Section 732.402(6), F.S.

⁸ Article X, s. 4, Fla. Const.

⁹ Section 732.201, F.S.

¹⁰ *In re Anderson's Estate*, 394 So.2d 1146 (Fla. 4th DCA 1981)

¹¹ Section 732.2065, F.S.

¹² Section 732.2105, F.S.

Timing for Filing for Elective Share and Exempt Property

Because the current law provides that the timing requirements for making an election, withdrawing an election, and filing for a petition for determination of exempt property must be "within" a certain period, it is possible that a court may find that a spouse or child of a decedent has filed a notice too early. In such case, a spouse or child could lose their right to exempt property or to the elective share.

Timing of Objections to the Validity of the Will, the Personal Representative, the Venue, or the Jurisdiction of the Court

Section 733.212(3), F.S., provides that "the notice of administration shall state" that an interested person must object to the validity of the will, the qualifications of the personal representative, the venue, or the jurisdiction of the court by filing a petition or other pleading requesting relief within 3 months after the date of service of a copy of the notice of administration on the objecting person, or the objection is forever barred. The window of time for filing an objection under this section has the same possibility of penalizing people that file too early as the filing deadlines for the elective share and exempt property.

Access to Safe-Deposit Boxes

Part of the Probate Code revisions enacted by the Legislature in 2002 addressed procedures for granting access to safe-deposit boxes to personal representatives and other fiduciaries. These revisions caused there to be some inconsistencies between the Probate Code and the Banking Code. The procedures set forth in s. 655.935, F.S., addressing the search procedures upon the death of a lessee, are arguably in conflict with the provisions of s. 733.6065, F.S., which are procedures addressing the initial opening of the safe-deposit box with the personal representative of a decedent lessee. The procedures of s. 733.6065, F.S., and s. 655.935, F.S., are also arguably in conflict with 655.937, F.S., which provides that a bank must grant access to the box to a co-lessee, regardless of whether another lessee is competent or living. The conflict consists of one statute that sets forth access rights and procedures, which must be followed upon the death of one co-lessee, and the other statute that sets forth rights of the surviving co-lessee.

Effect of Bill

Timing for Filing for an Elective Share

This bill amends s. 732.2135, F.S., to provide that a surviving spouse must file for the elective share election "on or before" the earlier of the date that is 6 months after the date of service of a copy of the notice of administration or the date that is 2 years after the date of the decedent's death.

Section 732.2135, F.S. is also amended to provide that the surviving spouse, guardian, or personal representative may withdraw an elective share election "on or before the earlier of the date that is" 8 months after the date of the decedent's death or the date of a court order of contribution. This bill removes the word "within", and allows people entitled to an elective share to file anytime before the time limit provided instead of having to file in between certain periods of time.

Timing for Filing for Exempt Property

This bill amends s. 732.402, F.S., relating to exempt property, by making the same changes to the word "within" as were made in the section relating to the elective share. This bill provides that a person entitled to exempt property is deemed to have waived his or her rights to exempt property unless a petition of determination of exempt property is filed "on or before the later of the date that is" 4 months after the date of service of the notice of administration or the date that is 40 days after the date of termination of any proceeding involving the estate.

Notice of Administration

This bill amends s. 733.212, F.S., to require that a notice of administration include notice to a surviving spouse and beneficiaries of the timing deadlines for filing for an elective share and exempt property.

Timing of Objections to Validity of the Will, the Personal Representative, the Venue, or the Jurisdiction of the Court

This bill also amends s. 733.212, F.S., to remove the "within" from the timing requirements, provided in the notice of administration, for filing a petition or other pleading objecting to the validity of the will, the qualifications of the personal representative, the venue, or the jurisdiction of the court. This bill extends the filing deadline to be "on or before the date that is" (instead of "within") 3 months after the date of service of a copy of the notice of administration on the objecting person, or those objections are forever barred. This change reflects the same revision to the filing deadlines made to exempt property and the elective share.

Timing of Service

This bill creates s. 733.212(8), F.S. to provide that, for determining deadlines established by reference to the date of the service of a copy of the notice of administration, service is deemed to occur on the date the waiver is filed.

Access to Safe-Deposit Boxes

This bill amends s. 655.935, F.S., of the banking laws, to provide that upon the death of a lessor, the lessee must allow a person qualified under this section to open and examine the contents of a safe-deposit box leased and co-leased by a decedent. Section 655.935, F.S., is also amended to provide that the access granted in this section is not to be considered the initial opening of the safe-deposit box pursuant to s. 733.6065, F.S., which is the section pertaining to the opening of a decedent's safe-deposit box.

This bill amends s. 655.937, F.S., to provide that when a safe-deposit box is leased in the names of two or more lessees, that access to the safe-deposit box will be granted to:

- Any one or more of the persons acting as personal representatives;
- Any one or more of the persons otherwise acting as fiduciaries if authorized in writing, which writing is signed by all other persons so acting;
- Any agent authorized in writing, which writing is signed by all persons acting as fiduciaries;
- The person named in a court order for the purpose, or if no order has been served upon the lessor, the spouse, a parent, an adult descendant, or a person named as a personal representative in a copy of a purported will produced by such person;
- The personal representative of the estate of either or any of such lessee who is deceased, or the guardian of the property of either or any of such lessees who is incapacitated.

This bill also provides that the right of access by a co-lessee is separate from the rights and responsibilities of other persons who may be granted access to a safe-deposit box after the death or incapacity of another co-lessee. This provision makes the distinction between this section that pertains to access to safe-deposit boxes leased in two or more names, and s. 655.935, F.S. and s. 733.6065, F.S., which also provide for when there is a co-lessee, and provide procedures for when a co-lessee of a safe-deposit box dies.

The co-lessee and any other person granted access to the safe-deposit box in s. 655.937, F.S., may make a written inventory of the box which will be conducted by the person making the request in the

presence of one other person. Each person present shall verify the contents of the box by signing a copy of the inventory under penalties of perjury.

This bill also provides that if the person making the written inventory is not a surviving co-lessee, the other person may be a surviving co-lessee, an employee of the institution where the box is located, or an attorney licensed in Florida.

This bill amends s. 733.6065(1), F.S., of the probate code, to specify that the procedure for the initial opening of a safe-deposit box include safe-deposit boxes leased or co-leased by the decedent. Section 733.6065(2), F.S., is amended to provide that the right to open and examine the contents of a safe-deposit box leased by a decedent, or any documents delivered by a decedent for safekeeping, and to receive items as provided for in s. 655.935, F.S., is separate from the rights provided for in 733.6065(1), F.S.

Section 655.935, F.S., s. 655.937, F.S., and s. 733.6065, F.S., all pertain to access to safe-deposit boxes, whether they are leased or co-leased, and procedures for when a lessee or co-lessee is a decedent. This bill revises these provisions found in the probate code and the banking laws by removing possible conflicts and providing conformity between the similar provisions.

C. SECTION DIRECTORY:

Section 1 amends 655.935, F.S., revising search procedure on death of lessee.

Section 2 amends 655.936, F.S., removing words "foreign" and "resident" from the statute.

Section 3 amends 655.937, F.S., revising access to safe-deposit boxes leased in two or more names.

Section 4 amends s. 732.2135, F.S., revising the time-period for when an election must be filed and for an election withdrawal.

Section 5 amends s. 732.402, F.S., revising the time-period when a person entitled to exempt property must file a petition for determination of exempt property.

Section 6 amends 733.212, F.S., revising what must be included in a notice of administration, and extending the deadlines for filing petitions objecting to the validity of the will, qualifications of the personal representative, the venue, or the jurisdiction of the court or other pleadings requesting relief in accordance with the Florida Probate rules.

Section 7 amends 733.6065, F.S., revising procedures for opening a safe-deposit box.

Section 8 provides an effective date of July 1, 2006.

II. 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:

Where the personal representative cannot find a person entitled to receive a copy of the notice of administration, the personal representative is required to publish the notice in a newspaper of general circulation. This bill increases the information required to be published in the notice of administration. The number of lines that the notice takes up on a page determines the cost to the estate. By increasing the amount of information in the notice, this bill adds to the length of the notice, and as a result, the cost of publication to the estate and heirs will likely increase.

D. FISCAL COMMENTS:

None.

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, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 11, 2006, the Civil Justice Committee adopted one amendment to this bill. The amendment revises the statutes that provide for access to safe-deposit boxes following the death of the lessor and creating an optional inventory by someone other than the personal representative if the safe-deposit box is co-leased. The bill was then reported favorably with a committee substitute.