

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Banking and Insurance

BILL: CS/SB 1936

INTRODUCER: Judiciary Committee and Senator Joyner

SUBJECT: Probate

DATE: April 12, 2007

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Knudson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill was designed by the Real Property, Probate, and Trust Law Section of The Florida Bar to update the Florida Probate Code. A number of the changes made by the bill are technical in nature. However, among the substantive changes, the bill:

- Makes the proceeds of certain pension and profit sharing plans that are exempt from creditor claims available to fund a spouse's elective share;
- Makes enforceable provisions in wills and trusts that require disputes among beneficiaries and heirs to be resolved through arbitration; and
- Limits the enforceability of provisions in wills that relieve personal representatives from liability for a breach of a fiduciary duty.

This bill substantially amends the following sections of the Florida Statutes: 222.21, 731.110, 731.201, 732.102, 732.103, 732.104, 732.108, 732.2025, 732.2035, 732.2075, 732.401, 732.4015, 732.507, 734.101, and 895.02. This bill also creates sections 731.401 and 733.620, Florida Statutes.

II. Present Situation:

The Florida Probate Code was substantially revised in 2001. However:

a recent review by the Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar identified several provisions of the Code which need to be updated. These include the following: Chapter 732 provisions that currently are not in compliance with the Federal Tax Code; the use of several

terms used interchangeably when referring to certain “descendants” which may lead to confusion as to statutory intent; the current provision as to notice for filing a caveat requires clarification to ensure proper notice; a conforming change is needed for the foreign personal representative statute section; the Florida Trust Code contains a provision voiding exculpatory clauses in certain situations, a conforming provision is needed in The Probate Code; and while the common law provides for enforcing arbitration clauses in wills or trusts, this is currently not addressed statutorily in the Florida Probate Code.¹

Caveat

Under s. 731.110, F.S., “[a]ny person . . . who is apprehensive that an estate . . . will be administered or that a will may be admitted to probate without the person’s knowledge may file a caveat with the court.” The effect of filing the caveat is not specified in the statute. However, s. 731.110, F.S., read in conjunction with Florida Probate Rule 5.260(f) and s. 733.2123, F.S., requires a person filing a petition to administer a will to serve formal notice of the petition on the caveators. Further, upon the filing of a caveat, “will contests and the rights of caveators must be determined prior to letters of administration being issued.”²

According to the Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL), caveators do not always receive notice as required by the Florida Probate Rules.³ Thus, the administration of a will may begin without giving caveators the opportunity to participate in the proceeding.

Arbitration of Disputes Among Beneficiaries to a Will

Florida does not have a statute that mandates the enforcement of a provision in a will that requires beneficiaries to arbitrate their disputes regarding estate property. However, “[a]rbitration that is mandated by a testator or settlor can be supported by theories of testamentary intent and conditional transfers of property.”⁴

Elective Share Laws

A surviving spouse of a person domiciled in Florida has the right to an elective share equal to 30 percent of the decedent’s elective estate.⁵ The elective estate includes a decedent’s probate estate and certain non-probate assets, such as “Pay On Death” accounts, property held in joint tenancy with right of survivorship, the cash surrender value immediately before the decedent’s death of a life insurance policy, and property transferred within a year prior to the decedent’s death, with some exceptions.⁶

Exclusion from Elective Estate

Property which may be transferred within a year prior to the decedent’s death that is not part of the elective estate includes gifts valued at or below the annual exclusion amount established in

¹ Real Property, Probate, and Trust Law Section of The Florida Bar, White Paper, An Act Relating to Probate 2007 1 (undated) (unpublished manuscript, on file with the staff of the Committee on Judiciary).

² Estate of Hartman v. Eberhardt, 836 So. 2d 1038, 1039 (Fla. 2d DCA 2002).

³ Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 1, at 1.

⁴ *Id.* at 2.

⁵ Sections 732.201 and 732.2065, F.S.

⁶ Section 732.2035, F.S.

s. 2503(b) and (c) of the Internal Revenue Code.⁷ That amount was previously set at \$10,000 per person to whom a gift was given but, has increased to \$12,000 as the result of a cost-of-living adjustment.⁸

Creditor Claims on Pension and Profit Sharing Benefits

Section 732.2035(7), F.S., provides that a decedent's elective estate includes pensions, retirement or deferred compensation plans, or similar arrangements. These assets, however, are not exempt from creditor claims upon the death of the decedent.⁹ Thus, these funds may not be available to support a spouse of an indebted decedent.

Elective Share Trusts

Section 732.2025(2), F.S., defines the term "elective share trust." Under the definition, an elective share trust may include a trust "subject to the provisions of former s. 738.12," F.S. Prior to its repeal in 2002, that section required trustees to provide trust beneficiaries with up to 3 percent of the principal of a trust if the trust did not generate at least a 3-percent return on investment.

Exculpation of Personal Representative

The Florida Statutes do not limit the extent to which a provision of a will may relieve a personal representative for breach of fiduciary duty. According to the RPPTL, "[t]here is significant potential for overreaching on behalf [of] the personal representative through the use of self-serving exculpatory terms."¹⁰

Descendants and Collateral Heirs

The use of the terms "descendant" and "lineal descendant" interchangeably in the Florida Probate Code has caused confusion among attorneys and those involved with estate and trust administration.¹¹ Furthermore, the distinction between the terms "collateral heirs" and "lineal descendants" is not clear in the Florida Statutes.¹²

Delivery of Property to Foreign Personal Representatives

Under s. 655.936(2), F.S., a lessor of a safe-deposit box may wait three months from the appointment of a personal representative for a decedent from another state before delivering the contents of the box to the personal representative. However, the lessor must deliver the contents of the safe-deposit box to a personal representative appointed in this state if the contents have not been delivered to the out-of-state personal representative.

In comparison, under the circumstances described in s. 734.101, F.S., a person in this state who is indebted to a decedent from another state must wait 60 days from the appointment of a personal representative in another state before paying the debt to that personal representative.

⁷ Section 732.2035(8), F.S.

⁸ 26 U.S.C. § 2503(b); INTERNAL REVENUE SERVICE, PUBLICATION 950, INTRODUCTION TO ESTATE AND GIFT TAXES 4 (Sept. 2006).

⁹ See s. 222.21(2), F.S.

¹⁰ Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 1, at 3.

¹¹ *Id.* at 3.

¹² *Id.*

III. Effect of Proposed Changes:

This bill was designed by the Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL) to update the Florida Probate Code. A number of the changes made by the bill are technical in nature. However, among the substantive changes, the bill:

- Makes the proceeds of certain pension and profit sharing plans that are exempt from creditor claims available to fund a spouse's elective share;
- Makes enforceable provisions in wills and trusts that require disputes among beneficiaries and heirs to be resolved through arbitration; and
- Limits the enforceability of provisions in wills that relieve personal representatives from liability for a breach of a fiduciary duty.

Caveat (Section 731.110, F.S.)

The bill integrates the language of Florida Probate Rule 5.260(f) into s. 731.110, F.S. As a result, the bill may clarify that a person who files a caveat is entitled to be served with a petition for administration before a will is admitted to probate. However, this provision of the bill read in conjunction with existing s. 733.2123, F.S., likely requires the caveator to challenge the will and the qualifications of the personal representative before the issuance of letters.

Arbitration of Disputes (Section 731.401, F.S.)

The bill makes enforceable provisions of a will or trust requiring arbitration to resolve disputes between or among beneficiaries or beneficiaries and a fiduciary. A requirement for the use of arbitration will be interpreted to mean binding arbitration, unless specified otherwise.

Elective Share Laws (Sections 222.21, 732.2025, 732.2035, and 732.2075, F.S.)

The bill conforms the value of property not subject to a spouse's elective share, which was given as a gift within a year of the decedent's death, to the current amount excludable from taxable gifts under s. 2503 of the Internal Revenue Code. As a result, this amount will increase to \$12,000 from \$10,000. Moreover, statute will track future changes in the amount excludable from taxable gifts resulting from the cost-of-living adjustment in s. 2503(b)(2) of the Internal Revenue Code.

The bill makes pensions, retirement or deferred compensation plans, or similar arrangements that were not subject to creditor claims during a decedent's life available to fund a spouse's elective share. As such, these funds, which are available under existing law to pay creditor claims on the death of the owner, may no longer be available to pay creditor claims under the bill.

This bill revises the definition of "elective share trust" in s. 732.2025(2)(b), F.S., to no longer include trusts "subject to the former s. 738.12," F.S. According to the RPPTL, the modification to the definition "ensures that an elective share trust will qualify for the Federal estate tax marital deduction."¹³

The bill revises the description of a protected charitable interest in s. 732.2075(2), F.S. The changed description "clarifies that transfers to protected charitable interests under either the

¹³ Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 1, at 2.

United State[s] gift tax law or the United States income tax laws [] would not be available for the payment of the elective share.”¹⁴

Exculpation of Personal Representative (Section 733.620, F.S.)

The bill restricts the enforceability of a provision of a will that limits the liability of a personal representative for a breach of a fiduciary duty. Accordingly, under the bill, a personal representative cannot be relieved for a breach of a fiduciary duty committed in bad faith or with reckless indifference to the purposes of the will or the interests of interested persons. However, limitations on liability inserted in a will at the behest of a personal representative may be enforced if the limitation is fair and was communicated to the testator or the testator’s attorney.

Definition of Descendant and Collateral Heir (Sections 731.201, 732.102, 732.103, 732.104, 732.108, 732.401, 732.4015, and 732.507, F.S.)

The bill clarifies that the terms “descendant” and “lineal descendant” are synonymous. Moreover, the bill changes references in existing law to descendant from lineal descendant. The bill also provides a definition of collateral heir and makes other technical changes.

Foreign Personal Representatives (Section 734.101, F.S.)

The bill increases the amount of time to 90 days from 60 days that a debtor to a decedent domiciled in another state must wait, in certain circumstances, to pay the debt to an out-of-state personal representative.

Effective Date

The bill provides an effective date of July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

¹⁴ *Id.*

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
