

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 311

Probate

**SPONSOR(S):** Hukill

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 1936

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Constitution &amp; Civil Law</u>	<u>6 Y, 0 N</u>	<u>Thomas</u>	<u>Birtman</u>
2) <u>Safety &amp; Security Council</u>	<u>15 Y, 0 N, As CS</u>	<u>Thomas</u>	<u>Havlicak</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

Probate is the legal process by which a will is proved to be valid or invalid, and generally provides for payment of the bills of the deceased, as well as distribution of the deceased's property to heirs. Current law pertaining to wills and estates is provided in the Florida Probate Code found in Chapters 731-735 of the Florida Statutes. The bill modifies several sections of the Probate Code to:

- conform the elective share statute to the Federal Tax Code;
- provide that persons filing a caveat will be properly noticed;
- provide for the enforcement of arbitration clauses in wills or trusts;
- void exculpatory clauses under specific circumstances;
- revise multiple statutes that use the term "descendants" to remove use of the term "lineal;" and
- make a conforming change to the time requirements under the foreign personal representative statute.

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

The bill becomes effective on July 1, 2007

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Empower families -- This bill may serve or benefit families when going through the probate process.

Provide limited government -- This bill revises state mandated requirements in probate proceedings.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background**

Probate is the legal process for determining the validity or invalidity of a will, and generally provides 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, then are used to pay the outstanding debts of the deceased, and the remainder is 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 leave a valid will, the estate is "intestate," and the assets are distributed according to statute. There are two significant exceptions to these general rules: exempt property and homestead property transfer to certain surviving dependents before such property is subject to being sold to pay creditors; and the elective share provisions may provide a different inheritance for a surviving spouse than the spouse would otherwise receive by operation of the will and of probate law.

##### **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,<sup>1</sup> instead of the share of the estate provided in the will or provided in the laws of intestacy. The elective share is for the express purpose of caring for the surviving spouse.<sup>2</sup> The elective share is statutorily set at 30% of the elective estate.<sup>3</sup> 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 (not mentioned in the will) spouse. The elective share is in addition to the spouse's right to exempt property, a family allowance, and homestead.<sup>4</sup> Florida's elective share statutes<sup>5</sup> were substantially amended in 1999.<sup>6</sup> The Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar has identified several provisions of the elective share statutes that have potential federal estate and gift tax consequences.

The bill amends s. 732.2025, F.S., to delete an obsolete reference to s. 738.12, F.S. that was repealed in 2002<sup>7</sup> and to provide that the term "income" has the same meaning as that provided in s. 643(b) of the Internal Revenue Code<sup>8</sup> to ensure that an elective share trust will qualify for the Federal estate tax marital deduction. The bill makes a change to s. 732.2035, F.S., to coordinate this provision with the

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<sup>1</sup> Section 732.201, F.S.

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

<sup>3</sup> Section 732.2065, F.S.

<sup>4</sup> Section 732.2105, F.S.

<sup>5</sup> See part II of ch. 732, F.S.

<sup>6</sup> See ch. 99-343, L.O.F.

<sup>7</sup> See s. 2, ch. 2002-42, L.O.F.

<sup>8</sup> The definition in the Internal Revenue Code is: "the term "income", when not preceded by the words "taxable", "distributable net", "undistributed net", or "gross", means the amount of income of the estate or trust for the taxable year determined under the terms of the governing instrument and applicable local law. Items of gross income constituting extraordinary dividends or taxable stock dividends which the fiduciary, acting in good faith, determines to be allocable to corpus under the terms of the governing instrument and applicable local law shall not be considered income." I.R.C. s. 643(b) (2006).

gift tax annual exclusion amount under §2503(b)<sup>9</sup> or §2503(c)<sup>10</sup> of the Internal Revenue Code. The change to s. 732.2075, F.S., provides that transfers to protected charitable interests under either the United State gift tax laws or the United States income tax laws would not be available for the payment of the elective share. Finally, the bill amends s. 222.21, F.S., to track the provisions regarding pension and profit sharing benefits with the contribution requirements under the elective share statute.

### **Caveat**

Subsection 731.110(3), F.S., provides that any interested person<sup>11</sup>, including a creditor, concerned that an estate may be opened without that person's knowledge may file a caveat (a demand that the will be produced and probated in open court) with the probate court. The purpose of the caveat is to insure that an individual receives notice of the probate administration. A caveat is a request made by an interested person and 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, last known residence address, and date of birth, if known. The person filing the caveat must provide a statement of the interest in the estate and his or her name and specific residence address. A caveat filed by a person 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.

The Probate Law Committee has reported that, while creditors do not seem to have a problem with notification, persons who are not creditors sometimes do not get sufficient notification or the opportunity to participate in the process. The addition of subsection (3) to the statute provides that notification prior to the admission of the will to probate and the issuance of Letters of Administration is a substantive right of the interested person who has filed the a caveat.

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<sup>9</sup> Section 2503(b) of the Internal Revenue Code provides:

(b) Exclusions from gifts

(1) In general - In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year, the first \$10,000 of such gifts to such person shall not, for purposes of subsection (a), be included in the total amount of gifts made during such year. Where there has been a transfer to any person of a present interest in property, the possibility that such interest may be diminished by the exercise of a power shall be disregarded in applying this subsection, if no part of such interest will at any time pass to any other person.

(2) Inflation adjustment - In the case of gifts made in a calendar year after 1998, the \$10,000 amount contained in paragraph (1) shall be increased by an amount equal to -

(A) \$10,000, multiplied by

(B) the cost-of-living adjustment determined under section 1(f)(3) for such calendar year by substituting "calendar year 1997" for "calendar year 1992" in subparagraph (B) thereof. If any amount as adjusted under the preceding sentence is not a multiple of \$1,000, such amount shall be rounded to the next lowest multiple of \$1,000.

<sup>10</sup> Section 2503(c) of the Internal Revenue Code provides:

(c) Transfer for the benefit of minor - No part of a gift to an individual who has not attained the age of 21 years on the date of such transfer shall be considered a gift of a future interest in property for purposes of subsection (b) if the property and the income therefrom -

(1) may be expended by, or for the benefit of, the donee before his attaining the age of 21 years, and

(2) will to the extent not so expended -

(A) pass to the donee on his attaining the age of 21 years, and

(B) in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment as defined in section 2514(c).

<sup>11</sup> "Interested person" means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative of the estate shall be deemed to be an interested person. In any proceeding affecting the expenses of the administration and obligations of a decedent's estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor's estate. The term does not include a beneficiary who has received complete distribution. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings. Section 731.201, F.S.

## Definition of “Collateral Heirs” and “Descendant”

The terms “collateral heirs” and “descendant” are not defined in the Probate Code.<sup>12</sup> The use of the term “descendant” is often interchanged with the term “lineal descendant” in multiple probate statutes and may cause confusion among estate planning attorneys and those involved in estate and trust administration. Further, the distinction between “collateral heirs” and “lineal descendants” results in inconsistent application by practitioners with unintended results.

The bill creates definitions for the terms “collateral heirs” and “descendant.” “Collateral heirs” is defined as “heirs who are descendants of an ancestor, excluding the decedent’s own descendants and ancestors.” “Descendant” is defined as “a person in any generational level down the applicable individual’s descending line and includes children, grandchildren, and more remote descendants. The term “descendant” is synonymous with the terms “lineal descendant” and “issue” but excludes collateral heirs.” The bill amends ss. 732.102, 732.103, 732.104, 732.108, 731.401, and 732.507, F.S., to delete the word “lineal” where it occurs immediately before the word “descendant” to conform to the new definition.

## Arbitration

Florida’s Arbitration Code is codified in ch. 682, F.S. Many aspects of arbitration as an alternative to judicial action are codified in ch. 44, F.S. Section 682.02, F.S., provides that arbitration agreements are valid, irrevocable, and enforceable where two or more parties “agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof.”

Florida law does not specifically provide whether arbitration provisions in a will or trust requiring the arbitration of disputes among beneficiaries or a fiduciary are enforceable. While there is no case law directly on point, Florida courts generally hold that arbitration clauses are personal covenants, binding only upon the parties to the covenant.<sup>13</sup> It is unclear whether beneficiaries or the fiduciary would be considered parties to the covenant.

The bill creates s. 731.401, F.S., to provide that a provision in a will or trust that requires arbitration of disputes, other than to resolve disputes regarding the validity of all or part of a will or trust, among beneficiaries and a fiduciary, or any combination thereof, are enforceable. If the will or trust does not specify the method of arbitration, it is presumed that the provision requires binding arbitration in accordance with the provisions of s. 44.104, F.S.

Section 44.104, F.S., provides that two or more parties who are involved in a civil dispute may agree in writing to submit the controversy to voluntary binding arbitration in lieu of litigation provided no constitutional issue is involved.<sup>14</sup> The provisions of s. 44.104, F.S., do not apply to disputes involving the rights of a third party not a party to the arbitration or voluntary trial resolution when the third party would be an indispensable party if the dispute were resolved in court, or when the third party notifies the chief arbitrator that the third party would be a proper party if the dispute were resolved in court, that the third party intends to intervene in court, and that the third party does not agree to proceed.<sup>15</sup>

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<sup>12</sup> The terms “heir” and “heirs at law” are defined in s. 731.201(18), F.S., as “those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.”

<sup>13</sup> *American International Group, Inc., v. Cornerstone Businesses, Inc.*, 872 So.2d 333 (Fla. 2nd DCA 2004).

<sup>14</sup> Section 44.104(1), F.S.

<sup>15</sup> Section 44.104(14), F.S.

## **Exculpation of Personal Representative**

The powers and duties of a personal representative of an estate are governed under part VI of ch. 733, F.S. Section 733.609, F.S., provides for the improper exercise of power and the breach of fiduciary duty. A personal representative has a fiduciary duty to the estate, similar to that of a trustee of an express trust. A personal representative is liable for damage or loss resulting from the breach of this duty. Presently, Florida statutes do not define the limits of a will provision that attempts to relieve a personal representative for liability for breach of fiduciary duty. Without such a statutory limitation, there exists the opportunity for overreaching on behalf on the personal representative through the use of self-serving exculpatory terms.

The bill creates s. 733.620, F.S., which tracks the language added to Florida's Trust Code last year regarding trustees. The new statute is intended to prevent overreaching by a personal representative who may insert such a provision without adequately informing the client of the consequences. The statute renders an exculpatory clause unenforceable if it relieves the personal representative of liability for breach of fiduciary duty committed in bad faith or reckless indifference. It also voids exculpatory clauses that are caused to be inserted by the personal representative unless it can be proved that the clause was fair or its existence and contents were adequately communicated directly to the testator.

The bill provides that an exculpatory term drafted or caused to be drafted by the personal representative within a will created on or after July 1, 2007, relieving a personal representative of liability to a beneficiary for breach of fiduciary duty is not considered invalid if the exculpatory term was adequately communicated directly to the testator or to the independent attorney of the testator.

## **Foreign Personal Representative**

Section 655.936, F.S., provides for the delivery of safe-deposit box contents or other property held for safekeeping by a financial institution to a personal representative. Subsection (2) of this section provides a specific procedure when the personal representative is a foreign personal representative – one that has been appointed by a court other than a Florida court. If a financial institution has not received written notice of the appointment of a personal representative by a court in Florida, this subsection authorizes a financial institution to deliver to the foreign personal representative, three months after the date of appointment of the foreign personal representative, all property held for safekeeping by the institution.

Section 734.101, F.S., provides for certain actions of foreign personal representatives and the related estate. This section authorizes debtors, mortgage holders, lien holders, and persons having possession of property in Florida belonging to a decedent of a foreign estate under probate, who have not received a written demand from a personal representative appointed in Florida, to pay the debt or deliver the property to the foreign personal representative, after the expiration of 60 days from the date of appointment of the foreign personal representative. This time requirement is not in line with the three month requirement provided in s. 655.936, F.S.

The bill amends to s. 734.101, to change its 60 day time requirements to 90 days.

## **Grammatical and Technical Changes**

The bill amends s. 732.4015, F.S., related to the devise of homestead property to include the term “minor children” wherever the term “minor child” occurs.

The bill amends s. 895.02(10), F.S., to conform a cross-reference to the change in numbering of the definitions necessitated by revisions to s. 731.102, F.S., by this bill.

C. SECTION DIRECTORY:

Section 1 amends s. 222.21, F.S., relating to exemption of pension money and certain tax-exempt funds or accounts from legal processes.

Section 2 amends s. 731.110, F.S., relating to caveats and proceedings.

Section 3 amends s. 731.201, F.S., relating to general definitions.

Section 4 creates s. 731.401, F.S., relating to arbitration of disputes.

Section 5 amends s. 732.102, F.S., relating to spouse's share of intestate estate.

Section 6 amends s. 732.103, F.S., relating to share of other heirs.

Section 7 amends s. 732.104, F.S., relating to inheritance per stirpes.

Section 8 amends s. 732.108, F.S., relating to adopted persons and persons born out of wedlock.

Section 9 amends s. 732.2025, F.S., relating to definitions.

Section 10 amends s. 732.2035, F.S., relating to property entering into elective estate.

Section 11 amends s. 732.2075, F.S., relating to sources from which elective share payable; abatement.

Section 12 amends s. 732.401, F.S., relating to descent of homestead.

Section 13 amends s. 732.4015, F.S., relating to devise of homestead.

Section 14 amends s. 732.507, F.S., relating to effect of subsequent marriage, birth, adoption, or dissolution of marriage.

Section 15 creates s. 733.620, F.S., relating to exculpation of personal representative.

Section 16 amends s. 734.101, F.S., relating to foreign personal representative.

Section 17 amends s. 895.02, F.S., relating to definitions, to conform a cross-reference.

Section 18 provides an effective date of July 1, 2007.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

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

Section 16 of the bill amends s. 734.101, F.S., to change the 60-day time requirements to 90 days. This is being done to conform to the three month time requirement provided in s. 655.936, F.S. Technically, 90 days and three months are not always the same amount of time. It is recommended that these sections use the same term regarding time requirements.

**D. STATEMENT OF THE SPONSOR**

No statement was submitted by the original bill sponsor.

The chair of the Safety & Security Council chose not to submit any further comments regarding the council substitute.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 21, 2007, the Safety & Security Council adopted an amendment and reported the bill favorably as amended. The amendment adds a qualification to the prohibition in the bill against exculpatory terms in a will to provide that an exculpatory term drafted or caused to be drafted by the personal representative within a will relieving a personal representative of liability to a beneficiary for breach of fiduciary duty is not considered invalid if the exculpatory term was adequately communicated to the independent attorney of the testator. This provision will apply only to wills created on or after July 1, 2007.

This analysis is addressed to the bill as amended by the Council.