

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: CS/CS/SB 724

INTRODUCER: Banking and Insurance Committee; Judiciary Committee; and Senator Passidomo

SUBJECT: Estates

DATE: April 4, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 724 modifies several sections of the Florida Probate Code relating to the “elective share”—that is, the 30 percent portion of a decedent’s estate that a surviving spouse may elect to take regardless of what is provided to him or her in the decedent’s testamentary plan.

Current law does not include homestead property in the elective estate, the part of the property from which the surviving spouse can take 30 percent. The bill expressly includes the decedent’s protected homestead in the elective estate. For the purpose of this calculation, homestead is valued differently depending on the interest that the surviving spouse would have in the homestead. The bill provides that if the surviving spouse receives a full, outright (“fee simple”) interest, the homestead is valued at its fair market value as of the decedent’s death.

Current law allows the surviving spouse to take a life estate in the homestead or take undivided one-half interest in the homestead. The bill provides that if the surviving spouse elects to take a life estate in the homestead or if the surviving spouse elects to take a one-half interest in the homestead, the homestead is valued at one-half of its fair market value on the decedent’s date of death.

Current law authorizes an award of attorneys’ fees and costs only where an election is made or attempted in bad faith. The bill expands the prospect of recovering these fees and costs in two ways. First, the bill expands the types of actions in which fees and costs may be granted. Second, an award of fees and costs no longer must be predicated on bad faith.

The bill extends the time in which a surviving spouse may move for an extension to choose the elective share, expands the application of interest penalties for late payment by those who are liable to contribute to the elective share, and adds a clause designed to “save” trusts that would qualify as “elective share trusts” if not for a particular deficiency.

II. Present Situation:

Elective Share

The law affords people broad authority to determine what will happen to their assets when they die. To exercise this authority, people may use one or more of a host of available tools, perhaps the best-known of which is a will. Other tools include trusts, beneficiary designations on bank accounts and any number of other items, and life insurance policies.

However, the authority of a person to determine the destination of his or her property upon his or her death is subject to a host of limitations. One of these limitations, which applies to people who are married at the time of their death, is called the “elective share.” This provision of Florida law entitles a decedent’s spouse to elect to receive a certain percentage of the estate, *regardless of what a will or other testamentary instrument says*. This percentage is called the “elective share.”

The elective share is 30 percent of the net value of the “elective estate.” Section 732.2035, F.S., lists the decedent’s assets that are included in the elective estate. These assets include the probate estate, as well as several categories of assets that do not pass through probate.

Homestead Not Included in Elective Estate

In Florida, the basic concept of a homestead is a home that is protected from most creditors and actions of courts. Homestead includes \$2,000 of personal property, but its main component is real property. Homestead property is specifically excluded from the elective estate.¹ As such, when calculating the elective estate, the value of the homestead is not included.

The Florida Constitution provides that the “homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner’s spouse if there be no minor child.”² A purpose of this provision is to prevent a surviving spouse from losing a home when a spouse dies. Section 732.401, F.S., implements this provision. It provides that a homestead is not devised according to law, the homestead is passed on as if the decedent died without a will. If a decedent is survived by a spouse and one or more descendants, the spouse can take a life estate in the homestead and the other descendants take per stirpes.³ The surviving spouse can opt to take an undivided one-half interest in the homestead in lieu of the life estate.⁴

¹ Section 732.2045(1)(i), F.S.

² Art. X, s. 4(c), Fla. Const.

³ Section 732.401(1), F.S.

⁴ Section 732.401(2), F.S.

Deadlines to Choose the Elective Share

In order to exercise the option to take the elective share, a surviving spouse must file his or her election with the court. The surviving spouse must file the election by the earlier of 6 months after the date the surviving spouse is served with the estate's Letters of Administration or 2 years after the death of the surviving spouse.⁵ Within these timeframes, the surviving spouse may petition the court for good cause for an extension of time to make the election.⁶

Contribution to the Elective Share

The elective share is available to a surviving spouse, even to one whom the decedent purposefully did not provide for in the decedent's testamentary plan. In a case in which a surviving spouse is not left assets equal to at least 30 percent of the elective estate in the testamentary plan, the amounts due the surviving spouse will need to come from assets that may be allocated to other persons. The statutes require this money to be paid from a progression of different asset types until the elective share is satisfied. These classes of assets are as follows:⁷

Class 1.—The decedent's probate estate and revocable trusts.

Class 2.—Recipients of property interests, other than protected charitable interests, included in the elective estate under s. 732.2035(2), (3), or (6), F.S. and, to the extent the decedent had at the time of death the power to designate the recipient of the property, property interests, other than protected charitable interests, included under s. 732.2035(5) and (7), F.S.

Class 3.—Recipients of all other property interests, other than protected charitable interests, included in the elective estate.

For purposes of [these classes], a protected charitable interest is any interest for which a charitable deduction with respect to the transfer of the property was allowed or allowable to the decedent or the decedent's spouse under the United States gift or income tax laws.⁸

Beneficiaries who have received a distribution of property that it included in the elective estate, as well as "direct recipients,"⁹ are liable to contribute to satisfying the elective share.¹⁰ These persons may have received property, rather than money, from the decedent's estate.

Instead of making a cash payment of the dollar amount for which one of these persons is liable, a beneficiary or direct recipient may contribute a proportional part of all property received. This person may also satisfy their contribution obligation by doing one of two things with respect to

⁵ Section 732.2135(1), F.S.

⁶ Section 732.2135(2), F.S.

⁷ Section 732.2075(2), F.S.

⁸ As an example, assume these simplistic facts: a man dies with two adult children, \$1,000,000 probate assets, no house, and a will that leaves his entire estate to his two children in equal parts. Also, assume that the assets are elective share assets, and that the wife files for her elective share. Here, the children, who would otherwise get \$500,000 each, will each need to contribute \$150,000 to satisfy the wife's elective share.

⁹ "Direct recipient" is defined to include "the decedent's probate estate and any other person who receives property included in the elective estate by transfer from the decedent . . . , by right of survivorship, or by beneficiary designation under a governing instrument." Section 732.2025(1), F.S.

¹⁰ Section 732.2085(1), F.S.

any property interest received before the date of the court's order of contribution. As one option, he or she may contribute all of the property. Or if the property has been sold or exchanged before the date the spouse's election was filed, the liable person may pay an amount equal to the value of the property on the date it was sold or exchanged, less reasonable costs of the sale.¹¹ Moreover, if a person pays the value of the property on the date of a sale or exchange, or if a person contributes all of the property received,¹² no further contribution is required as to the property. And that amount satisfies his or her contribution liability, even if it is less than the amount he or she would otherwise owe. Accordingly, the balance is then reapportioned among the other members of the class.¹³

Ultimately, it is the duty of the court to determine the elective share and all necessary contribution. And those who owe a contribution must pay interest on the contribution at the statutory interest rate. This interest begins accruing 90 days after the contribution order.

Elective Share Trusts

The law grants a decedent's estate several options as to the form of the transfer of an elective share. One option, of course, is to give the surviving spouse assets outright. But, in lieu of giving assets to the spouse outright, the law permits the decedent's estate to satisfy the elective share by merely placing assets into a trust for the benefit of the surviving spouse—an elective share trust. And the law seeks to ensure that the trust *actually* benefits the surviving spouse.

Accordingly, by definition, an elective share trust must authorize the surviving spouse to require the trustee either to make non-productive trust property productive or to convert it within a reasonable time.¹⁴

But even if a trust was intended to be an elective share trust and contains the other two elements of an elective share trust, the law contains no mechanism to allow the surviving spouse to nonetheless convert non-productive trust assets, thus "saving" the trust from failing the test. This type of savings mechanism exists in Florida law for a marital deduction trust.¹⁵

Attorney's Fees and Costs for Bad-Faith Elections

If the court determines that an election is made or pursued in bad faith, the court may assess attorney's fees and costs against the surviving spouse or the surviving spouse's estate.¹⁶

III. Effect of Proposed Changes:

Homestead is Included in the Elective Estate

A homestead as provided in Article X, s. 4 of the State Constitution is designed to protect one's home from most creditors and court actions. Homestead includes \$2,000 of personal property, but its main component is real property.

¹¹ Section 732.2085(2), F.S.

¹² That is, in the manner described in s. 732.2085(2)(b), F.S.

¹³ Section 732.2085(3)(a), F.S.

¹⁴ Section 732.2025(2), F.S.

¹⁵ Section 738.606, F.S.

¹⁶ Section 732.2135, F.S.

Under current law, homestead property is specifically excluded from the elective estate.¹⁷ As such, the value of the homestead is not factored in when calculation of the elective estate. The bill expressly includes homestead property in the elective estate, unless the surviving spouse has waived his or her homestead rights.

Valuation of Homestead for the Purpose of Valuation of the Elective Estate

The bill provides that if the homestead passes to the surviving spouse in fee simple, the homestead is valued at its fair market value¹⁸ on the date of the decedent's death.

If the surviving spouse takes a life estate or an undivided one-half interest in the homestead,¹⁹ the homestead is valued at one-half of its fair market value on the decedent's death date.

Deadline to Choose the Elective Share

In order to exercise the option to take the elective share, a surviving spouse must file his or her election with the court. The surviving spouse must file the election by the earlier of 6 months after the date the surviving spouse is served with the estate's Letters of Administration, or 2 years after the death of the surviving spouse.²⁰ Under current law, the surviving spouse may, *within these timeframes*, petition the court for good cause for an extension of time to make the election.²¹ The bill modifies this scheme.

The bill maintains that the surviving spouse may move for an extension with the same timeframes, and the bill maintains the 2-year absolute outer limit. However, the bill also permits a surviving spouse to move for an extension within 40 days after the termination of the proceedings specified in the bill.

Contribution to the Elective Share

Beneficiaries who have received a distribution of property that it included in the elective estate, as well as "direct recipients,"²² are liable to contribute to satisfying the elective share, both under current law and under the bill.²³ These persons may have received property, rather than money, from the decedent's estate.

Under the bill, as under current law, instead of making a cash payment of the dollar amount for which one of these persons is liable, a beneficiary or direct recipient may contribute a proportional part of all property received. This person may also satisfy their contribution obligation by doing one of two things with respect to any property interest received before the

¹⁷ Section 732.2045(1)(i), F.S.

¹⁸ The bill provides that "fair market value shall be calculated by deducting from the total value of the property all mortgages, liens, and security interests to which the protected homestead is subject and for which the decedent is liable, but only to the extent that such amount is not otherwise deducted as a claim paid or payable from the elective estate."

¹⁹ Sections 732.401(1) and 732.401(2), F.S.

²⁰ Section 732.2135(1), F.S.

²¹ Section 732.2135(2), F.S.

²² "Direct recipient" is defined to include "the decedent's probate estate and any other person who receives property included in the elective estate by transfer from the decedent . . . , by right of survivorship, or by beneficiary designation under a governing instrument." Section 732.2025(1), F.S.

²³ Section 732.2085(1), F.S.

date of the court's order of contribution. As one option, he or she may contribute all of the property. Or if the property has been sold or exchanged before the date the spouse's election was filed, the liable person may pay an amount equal to the value of the property on the date it was sold or exchanged, less reasonable costs of the sale.²⁴ Moreover, if a person pays the value of the property on the date of a sale or exchange, or if a person contributes all of the property received,²⁵ no further contribution is required as to the property. And that amount satisfies his or her contribution liability, even if it is less than the amount he or she would otherwise owe.²⁶

However, under the bill, if this person's required contribution is not fully paid by 2 years after the date of the death of the decedent, the person must pay interest at the statutory rate on any portion of the required contribution that remains unpaid.

Ultimately, it is the duty of the court to determine the elective share and all necessary contributions. And those who owe a contribution must, as a general matter, pay interest on the contribution at the statutory interest rate. This interest begins accruing 90 days after the contribution order under current law. The bill maintains this provision, but also imposes interest on any amount of the elective share not satisfied within 2 years of the date of the decedent's death, *regardless of whether an order of contribution was entered.*

Attorney's Fees and Costs

In current law, if the court determines that an election is made or pursued in bad faith, the court may assess attorney's fees and costs against the surviving spouse or the surviving spouse's estate.²⁷ The bill significantly expands the scope of this provision.

The bill removes the bad faith requirement, and the bill does not limit assessments of attorney's fees and costs to instances where someone makes or pursues an election.

Under the bill, the court may award fees and costs in *any proceeding* under the elective share statutes in which there is a dispute over:

- The entitled to of the amount of the elective share;
- The property interests included in the elective or its value; or
- The satisfaction of the elective share.

Moreover, the bill specifies that when the court award costs and fees, it may do one or more of the following:

- Direct payment from the estate;
- Direct payment from a party's interest in the elective share or the elective estate; or
- Enter a judgment that can be satisfied from other property of a party.

If the personal representative fails to file a petition to determine the amount of the elective share, as required by the Probate Rules, he or she may be liable for additional costs. Specifically, if the electing spouse or any of the other persons mentioned in the bill file the petition that the personal

²⁴ Section 732.2085(2), F.S.

²⁵ That is, in the manner described in s. 732.2085(2)(b), F.S.

²⁶ Accordingly, the balance is then reapportioned among the other members of the class. Section 732.2085(3)(a), F.S.

²⁷ Section 732.2135, F.S.

representative failed to file, he or she may be awarded the reasonable costs, including attorney's fees, incurred in connection with the preparation and filing of the petition.²⁸

The changes to the attorney fee provisions apply to all proceedings commenced after July 1, 2017.

Elective Share Trusts

By definition, elective share trusts must provide the surviving spouse with the ability to have non-productive trust assets converted to productive assets. However, current law does not provide a way to “save” a trust that fails to meet this requirement, though the trust otherwise meets the definition of an elective share trust and was intended to be an elective share trust. The bill changes this.

The bill authorizes a surviving spouse who is intended to benefit from an elective share trust to force the trustee to make the trust productive. Thus, the bill “saves” trusts that do not otherwise give the spouse this authority, but that are otherwise legally sufficient.

Effective Date

The bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

²⁸ The removal of the bad-faith requirement, the expansion of the types of people who may seek fees and costs, and the expansion of the types of proceedings for which the non-prevailing party may have to pay costs could encourage settlement of these matters. Additionally, it could discourage the very initiation of some proceedings, given the associated risk of being the non-prevailing party and having to pay fees and costs.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 732.2025, 732.2035, 732.2045, 732.2055, 732.2075, 732.2085, 732.2095, 732.2115, 732.2135, 732.2145, and 738.606.

This bill creates section 732.2151, Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Banking and Insurance on April 3, 2017:

Clarifies the method of calculating the fair market value of homestead property.

CS by Judiciary on March 14, 2017:

The bill created a tiered-rate structure, depending on the length of the marriage, to determine the amount of the elective share. These rates varied from 10 percent of the elective estate to 40 percent of the elective estate. The committee substitute removes this structure, returning to the current law's 30 percent, flat rate.

B. Amendments:

None.