

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 421 Homestead Waivers  
**SPONSOR(S):** Berman  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 512

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	9 Y, 0 N	MacNamara	Bond
2) Agriculture & Property Rights Subcommittee	13 Y, 0 N	Thompson	Smith
3) Judiciary Committee			

### SUMMARY ANALYSIS

Florida's Constitution provides that homestead property may not be transferred through a will or trust where the owner has a spouse or minor child, except the homestead may be transferred to the spouse where there is no minor child. A spouse, however, may waive this restriction through a written contract or agreement. A spouse's waiver must be knowing and intelligent.

The bill provides "safe harbor language" that may be included in a deed that creates a presumption that the spouse knowingly and intelligently waived his or her right to inherit such homestead property.

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

The effective date of the bill is July 1, 2018.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

##### Homestead Property

A homestead is not a property interest but is simply a constitutionally defined status. Article X, s. 4(a)(1) of the Florida Constitution provides protections for homestead property owned by "natural persons." A homestead is protected in three different ways: It provides the homestead with an exemption from some taxes; it protects the homestead from forced sale by creditors; and it places certain restrictions on a homestead owner from alienating or devising the homestead property. Section 731.201(33), F.S., defines "protected homestead" as:

[T]he property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution.

Homestead property owned by the decedent in either a joint tenancy with rights of survivorship or tenancy by the entireties is not protected homestead as the decedent's interest in the homestead property terminates at death.<sup>1</sup> Current law addresses the descent (transfer of property to descendants) of homestead property where no devise is allowed. Specifically, ss. 732.401, F.S., provides:

(1) [T]he homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

When there are no surviving minor children and the surviving spouse has waived his or her homestead rights, there is no constitutional restriction on the devise of the homestead property.<sup>2</sup>

##### Waiver of Homestead Rights by Surviving Spouse

Under s. 732.702, F.S., the rights of a surviving spouse to estate allowances, including a homestead, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses as provided by statute. The statute also requires fair disclosure where the contract, agreement, or waiver is signed after marriage and specifies that no consideration other than execution is required.

In order to find that a surviving spouse has waived or relinquished homestead protection, evidence must demonstrate such spouse's intent to waive the constitutional and statutory claim to homestead property. Stated differently, courts held that waivers of constitutional rights must be made knowingly and intelligently.<sup>3</sup>

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<sup>1</sup> s. 732.401(5), F.S.

<sup>2</sup> *City Nat'l Bank of Fla. v. Tescher*, 578 So.2d 701, 703 (Fla. 1991).

<sup>3</sup> *Rutherford v. Gascon*, 679 So. 2d 329 (Fla. 2d DCA 1996); See also *Chames v. DeMayo*, 972 So.2d 850 (Fla. 2007).

Recently, Florida courts have addressed the issue of whether joining in a deed might constitute a waiver of homestead rights. In *Stone v. Stone*<sup>4</sup>, the Fourth District Court of Appeal held that a spouse waived her homestead rights when she joined in the execution of a warranty deed on the property, transferring her interest in the property into a trust set up by her husband, despite her position that she did not intend to waive her constitutional homestead rights. The court relied on s. 732.702(1), F.S., in reaching their decision. Specifically, the court relied on the language in the statute providing that “a waiver of ‘all rights,’ or equivalent language” in a written contract, agreement, or waiver, is a waiver of all rights in homestead property.<sup>5</sup>

As cases like *Stone* illustrate, Florida courts allow a spouse to waive her rights in homestead property through the execution of a deed conveying the property. Moreover, the case illustrates instances where the language in the deed may be sufficient to establish waiver under s. 732.702, F.S., despite a surviving spouse’s contention that their waiver was not knowingly and intelligent at the time he or she executed the deed.

### **Effect of Proposed Changes**

The bill provides statutory language that may be placed in a deed that creates a presumption that a spouse has intentionally waived his or her rights in a homestead property. Specifically, the bill provides that the following language contained in a deed constitutes an intentional waiver of homestead rights by a spouse:

“By joining in this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me.”

The waiver language is not considered a waiver of:

- The protection against the owner’s creditors during the owner’s lifetime and after death; or
- The restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner’s spouse.

### **B. SECTION DIRECTORY:**

**Section 1:** Creates s. 732.7025, F.S., related to waiver of homestead rights through deed.

**Section 2:** Provides an effective date of July 1, 2018.

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

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

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

None.

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

None.

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<sup>4</sup> 157 So.3d 295 (Fla. 4th DCA 2014); See also *Lyons v. Lyons*, 155 So.3d 1179 (Fla. 4th DCA 2014); *Habeeb v. Linder*, 36 Fla. L. Weekly D300 (Fla. 3d DCA 2011).

<sup>5</sup> *Stone*, 157 So.3d at 304 (The court found that the language “all tenements, hereditaments, and appurtenances thereto belonging or in otherwise appertaining” in the deed constituted “all rights, or other equivalent language” for purposes of waiving spousal rights pursuant to s. 732.702(1), F.S.).

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

1. Revenues:

None.

2. Expenditures:

None.

**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. The bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

Not applicable.

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

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**