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 Community Affairs

BILL:	SB 512
INTRODUCER:	Senator Young
SUBJECT:	Homestead Waivers
DATE:	November 6, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Present	Yeatman	CA	**Pre-meeting**
2.			JU	
3.			RC	

I. Summary:

SB 512 creates a presumption that certain statutory language, or substantially similar language, in a deed constitutes an intentional waiver of a specific homestead protection for a married person that would otherwise apply upon the death of the other spouse. It is not the exclusive method for waiving such rights.

II. Present Situation:

Constitutional and Statutory Provisions Regarding the Devise of a Homestead

Under Florida law, a surviving spouse's rights in the couple's marital homestead residence are provided in Article (4)(c) of Article X of the Florida Constitution and s. 732.401, F.S. Spouses are free to contractually waive these rights.

The Florida Constitution defines when a homestead cannot be devised. Specifically, section (4)(c) of Article X of the Florida Constitution provides:

> 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. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Section (4)(c) of Article X of the Florida Constitution protects the surviving spouse and minor children from having the homestead property transferred out from under them by the other spouse (or other parent) without the consent of both spouses.[1]

Section 732.401, F.S., defines how a homestead vests if it is not devisable or if it is not validly devised in a manner authorized by Florida law (e.g., if the decedent is survived by a minor child and cannot devise the homestead or is survived by a spouse and no minor child but the decedent does not devise the homestead outright to the decedent's surviving spouse).

Generally, if not devised as permitted by law, the homestead descends as other intestate property, unless the decedent is survived by a spouse and one or more descendants, in which case the surviving spouse receives a life estate with a vested remainder in the then living descendants, per stirpes.[2] However, there is a 6 month post-death period in which there is a right of election for the surviving spouse to instead take a 50 percent tenant in common interest with the other 50 percent passing to the decedent's then living descendants, per stirpes.[3]

Section 732.201(10), F.S., defines a "devise" and provides:

> "Devise," when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will or trust. The term includes "gift," "give," "bequeath," "bequest," and "legacy." A devise is subject to charges for debts, expenses, and taxes as provided in this code, the will, or the trust.

Section 732.4015, F.S., defines a devise of homestead property. "As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no child or minor children."[4]

"Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead.[5]

Thus, for a homestead in a decedent's name or for a homestead in a revocable trust, the devise restrictions apply.

Statutory Provisions Regarding Homestead Waivers

Section 732.702, F.S., provides a procedure for waiving spousal rights, including homestead rights, under written contracts, agreements or waivers.

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[1] *Stone v. Stone*, 157 So. 3d 295, 299.
[2] Section 732.401(1), F.S.
[3] Section 732.401(2), F.S.
[4] Section 732.4015, F.S.
[5] Section 732.4015(2)(b), F.S.

Generally, under statute, a waiver of "all rights" is sufficient to waive all spousal rights in an agreement under the statute. Section 732.702(2), F.S., provides that if the agreement, contract or waiver is executed after marriage, then each spouse must make a fair disclosure to the other of that spouse's estate. No disclosure is required before marriage. Section 732.702(3), F.S., provides that no consideration is required for the agreement, contract or waiver to be valid.

Case Law

Recent case law has addressed the issue of whether joining in a deed (without any more formal agreement or acknowledgement) constitutes a waiver of homestead rights.

Habeeb v. Linder

The first published case on the issue of whether joining in a deed might constitute a homestead waiver was *Habeeb v. Linder*.[6] In order to be valid, a homestead-waiver agreement must provide the other spouse with a "fair disclosure" of his or her assets or estate, and the waiver must be "legally sufficient."[7] If a spouse provides that he or she "waives all rights," it is a legally sufficient waiver. In *Habeeb v. Linder*, the case centered on whether a deed that contained language that did not explicitly use the phrase "waive all rights" could be construed to waive homestead devise restriction rights.

The Third District Court of Appeal initially published an opinion holding that by joining in a deed, the joining spouse waived her post-death homestead devise restriction rights. The Court reasoned that the use of the word "hereditaments" in the deed was broad enough to constitute a legally sufficient waiver of homestead devise restrictions.[8] Stated another way, the Court found that a spouse that had transferred all "hereditaments" intended to "waive all rights." Subsequently, however, on May 17, 2011, in a sua sponte order, the Third District Court of Appeal withdrew the *Habeeb* decision. Thus, because of the withdrawal (and as a result of the settlement of that case which meant a final decision was not pursued), *Habeeb* is not a citable precedent.

Stone v. Stone

Subsequently, Florida's Fourth District Court of Appeal held that a spouse waived her homestead rights by joining in the execution of a deed, conveying her husband's one-half interest in a homestead property to a qualified personal resident trust in *Stone v. Stone*.[9] The *Stone* decision is consistent with the withdrawn opinion in *Habeeb*, that joining in a deed can constitute a waiver, even if the deed contained no special waiver language (legally sufficient language) and even if there was no evidence of a financial disclosure (fair disclosure).

After the *Stone* decision, in *Lyons v. Lyons*, the Fourth District Court of Appeal held that where a deed conveying the wife's interest in a homestead residence to a qualified personal residence

[6] *Habeeb v. Linder*, 36 Fla. L. Weekly D300 (Fla. 3d DCA 2011).
[7] Section 773.702, F.S.
[8] The term "hereditaments" includes "anything capable of being inherited, whether it is corporeal, incorporeal, real, personal, or mixed." 42 Fla. Jur. 2d Property s. 7 (2010).
[9] *Stone v. Stone*, 157 So. 3d 295 (Fla. 4th DCA 2014).

trust, without the joinder of the wife's spouse, the wife did not have standing to subsequently challenge the transfer.[10] The Court held that only the husband could challenge the transfer.

Although not expressly addressed in any of the aforementioned cases, Florida courts have consistently held that waivers of constitutional rights must be made knowingly and intelligently.[11]

III. Effect of Proposed Changes:

The bill provides that a spouse is presumed to have waived his or her rights as a surviving spouse with respect to the devise restrictions under s. 4(c), Art. X of the State Constitution if the following or substantially similar language is included in a deed:

"By joining 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."

This waiver language may not be considered a waiver of the protection against the owner's credit claims during the owner's lifetime and after death. The language may not be considered a waiver of the restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner's spouse.

The bill takes effect July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[10] *Lyons v. Lyons*, 155 So. 3d 1179 (Fla. 4th DCA 2014).
[11] *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007).

B. Private Sector Impact:

The bill may provide more certainty and greater predictability for Florida residents and their attorneys as they plan for the disposition of constitutionally protected homesteads upon death.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 732.7025 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.