

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 Judiciary

BILL: SB 1154

INTRODUCER: Senator Berman

SUBJECT: Decedents' Property

DATE: March 29, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
2.	<u>Delia</u>	<u>Hendon</u>	<u>CF</u>	
3.	<u> </u>	<u> </u>	<u>RC</u>	

I. Summary:

SB 1154 amends several sections of the probate code relating to compensation of attorneys who serve as personal representatives, conflicts of interest by personal representatives, and notice in probate proceedings. The bill also amends the trust code regarding compensation of attorneys who serve as trustees. Additionally, the bill makes various changes relating to co-owned personal property.

More specifically, the bill:

- Prohibits an attorney who prepared or supervised the preparation of a will from being compensated as a personal representative of the estate unless the attorney is a relative of the decedent or makes specified disclosures to the testator before the will is prepared;
- Provides a similar prohibition regarding an attorney who drafts a trust and serves as a trustee;
- Brings more types of transactions involving a personal representative's conflict of interest under the statute that renders these transactions voidable by an interested person;
- Attempts to clarify what constitutes sufficient notice for a court to exercise personal jurisdiction over a person in a probate proceeding;
- Eliminates the requirement that personal property held in a tenancy by the entirety or a joint tenancy with right of survivorship must be acquired by its co-owners at the same time and through the same instrument;
- Eliminates the requirement that personal property held in a joint tenancy with right of survivorship be held in equal shares or interests; and
- Creates a rebuttable presumption that an item of personal property owned by two spouses is owned in a tenancy by the entirety if the ownership document does not clearly indicate otherwise, the ownership document designates joint tenancy with right of survivorship and does not indicate that a tenancy by the entirety was not intended, or a spouse adds the other spouse's name to an ownership document;

- Creates a rebuttable presumption that an item of personal property is owned by joint tenants with right of survivorship if none of the above presumptions apply and the owner adds or designates another person's name in an ownership document indicating a joint tenancy with right of survivorship; and
- Categorizes as tangible property bullion and coins, such as collectible coins, that are not used as money.

The bill is not expected to have a fiscal impact on the state and has an effective date of October 1, 2019, except as otherwise provided.

II. Present Situation:

Conflict of Interests by Personal Representatives

Several types of transactions that involve a conflict of a personal representative's interests are avoidable by an interested person, except one who has consented after fair disclosure.¹ However, transactions that involve a conflict of the personal representative's interests are not avoidable if the will or a contract entered into by the decedent expressly authorized the transaction, or if it is authorized by a court after notice to interested persons.²

Compensation of Attorney Who Also Serves as Personal Representative or Trustee

An attorney licensed by the Florida Bar who serves as a personal representative of an estate and has rendered legal services in connection with the administration of the estate is allowed a fee for the legal services in addition to his or her fee as personal representative.³ However, the fee for legal services must be taken into account when determining the attorney's compensation for non-legal services as personal representative.⁴

Similarly, an attorney who provides legal services in his or her administration of the trust may accept reasonable compensation for the legal services in addition to his or her reasonable compensation as a trustee.⁵

Notice to Interested Persons in a Probate Proceeding

Section 731.301(2), F.S., provides that, in a probate proceeding, "formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's interest in the estate or in the decedent's protected homestead." The courts have interpreted this to include jurisdiction over a person in an adversarial proceeding, including one in which an out-of-state law firm providing legal services for a Florida estate may be forced to pay money back to the estate.⁶

¹ Section 733.610, F.S.

² *Id.*

³ Section 733.617, F.S.

⁴ Section 733.612(19), F.S.

⁵ Section 733.0708(3), F.S.

⁶ *See, e.g., Rogers and Wells v. Winston*, 662 So. 2d 1303 (Fla. 4th DCA 1995).

However, the Real Property, Probate and Trust Law Section of The Florida Bar asserts that the personal jurisdiction contemplated in s. 731.301(2), F.S., does not include this type of proceeding.⁷ Rather, the Section asserts that formal notice is sufficient for the court to acquire jurisdiction over a person for the purpose of determining the person's rights to estate property.⁸

Co-tenancy

An item of personal property, such as brokerage account or an automobile, may be owned by multiple people in one of a few arrangements, including “tenancy by the entirety” and “joint tenancy with right of survivorship.”⁹ Although these forms of co-ownership are substantially similar, one key difference between them is that a tenancy by the entirety may be used only by two married people.¹⁰

Joint Tenancy with Right of Survivorship

A joint tenancy with right of survivorship requires five “unities” as to an item of property, which are the unities of:

- Possession (joint ownership and control);
- Interest (the interests must be the same);
- Title (the interests must originate in the same instrument);
- Time (the interests must commence simultaneously); and
- Survivorship (both spouses take property outright upon the other's death).¹¹

Tenancy by the Entirety

A tenancy by the entirety requires an additional unity, the unity of marriage.¹² This means the co-owners of the property must be married at the time the property became titled in their joint names.

Due to the unities of time and title, a person may not create either of these forms of co-ownership by directly granting an interest in an item of property to another person. For example, a husband who is the sole owner of a brokerage account may not create a tenancy by the entirety in it with his wife by adding her name to the account—their interests in the account would have originated at different times and through different instruments.¹³

⁷ Real Property, Probate and Trust Law Section of The Florida Bar, *White Paper: Proposed amendment of § 731.301 to provide that service of formal notice does not confer in personam jurisdiction over the recipient* (2019) (on file with the Senate Committee on Judiciary).

⁸ *Id.*

⁹ See generally, *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45, 52 (Fla. 2001).

¹⁰ *Id.*

¹¹ See *Sitomer v. Orlan*, 660 So. 2d 1111, 1113 (Fla. 4th DCA 1995).

¹² See *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45, 52 (Fla. 2001).

¹³ Nonetheless, a husband or wife may create a tenancy by the entirety in real property (e.g., homes, land) by directly granting an interest to his or her spouse. See s. 689.11, F.S.

Presumptions regarding a Tenancy by the Entirety or a Joint Tenancy with Right of Survivorship

Beginning with the Florida Supreme Court in 2001, several courts have stated that personal property is presumed to be held as a tenancy by the entirety if it is owned:

- By two people who are married to each other; and
- In accordance with the six unities required for a tenancy by the entirety.¹⁴

The 2001 Supreme Court case addressed a bank account co-owned by a husband and wife. The court acknowledged that the law had long provided for a presumption of a tenancy by the entirety regarding *real property* held by a husband and wife. And the Court spoke in broad terms of extending this presumption of a tenancy by the entirety, not just to bank accounts, but to *personal property in general*. Though this language may be *dicta*, other courts have adopted it as law, applying it to other types of personal property, such as stock certificates.¹⁵

The holding of the 2001 Supreme Court case regarding bank accounts was codified in s. 655.79(1), F.S., which provides that “any deposit or account made in the name of two persons who are husband and wife shall be considered a tenancy by the entirety unless otherwise specified in writing.”¹⁶ The presumption may be overcome “only by proof of fraud or undue influence or clear and convincing proof of a contrary intent.”¹⁷

As with personal property held jointly by two people who are married to each other, the Florida Statutes do not provide a presumption that all items of personal property co-owned by multiple *non-married* people are held as a joint tenancy with right of survivorship. However, s. 655.79(1), F.S., provides a presumption that the co-owners have a right of survivorship in a bank account. As with tenancies by the entirety in bank accounts, the presumption may be overcome “only by proof of fraud or undue influence or clear and convincing proof of a contrary intent.”¹⁸

Precious Metals and Collectible Coins as Probate Assets

Florida law does not specify whether bullion or coins that are not commonly used as currency constitute tangible personal property. And according to the Real Property, Probate and Trust Law Section of The Florida Bar, there is a lack of consensus among practitioners regarding this issue.¹⁹ Accordingly, it is unclear whether certain directions given in a will would apply to collectible coins and bullion. Moreover, it is unclear whether certain provisions of law apply to these items. For example, s. 732.515, F.S., requires that “items of tangible property” be “specifically disposed of” by the will or by a separate writing. Because it is unclear whether

¹⁴ See *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45, 52 (Fla. 2001); *Cacciatore v. Fisherman’s Wharf Realty Ltd. Partnership ex rel. Emalfarb Investment Corp.*, 821 So. 2d 1251 (Fla. 4th DCA 2002); *Gibson v. Wells Fargo Bank, N.A.* 255 So. 3d 944, (Fla. 2nd DCA 2018).

¹⁵ See generally, *Cacciatore v. Fisherman’s Wharf Realty Ltd. Partnership ex rel. Emalfarb Investment Corp.*, 821 So. 2d 1251 (Fla. 4th DCA 2002).

¹⁶ Also, see *Wexler v. Rich*, 80 So. 3d 1097, 1101 (Fla. 4th DCA 2012), for a discussion of the common law rule that preceded the current version of s. 655.79(1), F.S.

¹⁷ Section 655.79(2), F.S.

¹⁸ Section 655.79(2), F.S.

¹⁹ Probate Law and Procedure Committee, Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper: Proposed Addition of § 731.1065, Florida Statutes* (2019) (on file with the Senate Committee on Judiciary).

bullion and collectable coins are tangible property, it is unclear whether they must be specifically disposed of pursuant to this statute.

III. Effect of Proposed Changes:

Fewer Requirements for a Tenancy by the Entirety or Joint Tenancy with Right of Survivorship (Section 1)

The bill abolishes the “unities” of time and title as requirements for a joint tenancy with right of survivorship or a tenancy by the entirety in personal property. As such, the persons who own an item of personal property need not have acquired their interests at the same time or through the same instrument in order to own the property in one of these tenancies. The bill also abolishes the unity of interest as a requirement for a joint tenancy with right of survivorship in personal property, which means owners do not need to have equal ownership interests.

Rebuttable Presumptions (Section 1)

Tenancy by the Entirety

The bill provides that there is a rebuttable presumption that personal property owned by both spouses is owned in a tenancy by the entirety if:

- An ownership document does not specify a different intent, either by “expressly indicating” that a tenancy by the entirety is not intended or by specifying a different form of ownership;
- There is a designation of joint tenancy with right of survivorship in an ownership document and no express indication that a tenancy by the entirety was not intended; or
- The co-ownership was created by a spouse adding his or her spouse’s name to an ownership document.

The *intent* to create a tenancy by the entirety in personal property is *conclusively* presumed when spouses designate this tenancy in an ownership document. This intent is also conclusively presumed when an owner adds the name of his or her spouse to an ownership document that designates a tenancy by the entirety, if the designation or addition was not the product of fraud, undue influence, or a lack of capacity.

Joint Tenancy with Right of Survivorship

The bill provides that there is a rebuttable presumption that personal property is owned in a joint tenancy with right of survivorship if the owner designates or adds the name of at least one other person in an ownership document. However, the document must indicate that the property is owned by these people in a joint tenancy with right of survivorship.

Overcoming the Rebuttable Presumptions of a Joint Tenancy with Right of Survivorship or a Tenancy by the Entirety

The rebuttable presumptions that personal property is owned in a tenancy by the entirety or a joint tenancy with right of survivorship may be overcome by proving:

- By a preponderance of the evidence the existence of fraud, undue influence, or lack of capacity; or
- By clear and convincing evidence that the presumed tenancy was not intended or created.

Equal Interests in a Tenancy in Common or a Joint Tenancy with Right of Survivorship

A third rebuttable presumption created by the bill is that the interests held by joint tenants with right of survivorship or tenants in common hold equal interests in personal property. This presumption may be overcome by proving by a preponderance of the evidence the existence of fraud, undue influence, lack of capacity, or contrary intent.

Precious Metals (Section 2)

The bill provides that for the purposes of the probate code, precious metals in any tangible form, including bullion or coins kept for purposes such as collecting and not for use as legal tender for payment are tangible personal property. The bill provides that this clarifies current law, which does not clearly categorize these items. Accordingly, the bill states that these provisions apply to all written instruments, as well as to all probate proceedings except those in which a disposition of these items has not been finally determined.

Notice in a Probate Proceeding (Sections 3 - 4)

Current s. 731.301(2), F.S., states, “In a probate proceeding, formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person’s interest in the estate or in the decedent’s protected homestead.” Following this sentence, the bill adds: “Formal notice is not sufficient to invoke the court’s personal jurisdiction over the person receiving formal notice.” Accordingly, the bill with existing law provides that formal notice gives a court “jurisdiction over the person,” but not “personal jurisdiction.” Because jurisdiction over the person and personal jurisdiction appear to be the same concept, the effect of the new sentence is not clear.

According to the Real Property Probate and Trust Law Section of The Florida Bar, the added sentence is intended to limit the court’s jurisdiction under the first sentence. The added sentence, according to the Section, will also require service of process to give a court personal jurisdiction with respect to matters beyond a person’s interest in the estate. To avoid the potential for uncertainty, the Legislature may wish to revise the second sentence to clarify the circumstances under which a method other than “formal notice” is required to give a court personal jurisdiction in probate proceedings or to specify what constitutes an “interest in the estate.”²⁰

Personal Representative’s Conflict of Interest (Section 5)

The bill renders voidable more types of sales, transactions, and encumbrances that involve a personal representative’s conflict of interest than current law. Subject to exceptions, current law renders voidable a sale or encumbrance of estate assets to any corporation or trust in which the personal representative has a substantial beneficial interest. The bill also renders voidable any sale or encumbrance to a corporation, trust, *or other entity* in which the personal representative or his or her *spouse, agent, or attorney* has a substantial beneficial or *ownership* interest.

²⁰ According to the RPPTL Section, the sentence added to s. 731.301(2), F.S., is intended to overrule *Rogers and Wells v. Winston*, 662 So. 2d 1303 (Fla. 4th DCA 1995) in which the Fourth DCA found that formal notice to a New York law firm handling Florida probate proceedings gave the trial court jurisdiction over the firm with respect to a payment dispute. The law firm objected to the trial court’s assertion of jurisdiction because it had not been served with process. Implicit in the appellate court opinion is a finding that the payments from a decedent’s estate to a firm are also an “interest in the estate.”

Compensation of a Personal Representative or Trustee Who is also an Attorney (Sections 6 - 8)

The bill prohibits an attorney from being compensated as a personal representative if the attorney prepared or supervised the execution of a will that nominated the attorney or person related to the attorney as personal representative. However, the prohibition does not apply if the attorney or person nominated is related to the testator. The prohibition also does not apply if the attorney discloses the following things prior to the execution of the will:

- Subject to certain statutory limitations, most family members, regardless of their residence, and any other persons who are residents of Florida, including friends and corporate fiduciaries, are eligible to serve as a personal representative;
- Any person, including an attorney, who serves as a personal representative is entitled to receive reasonable compensation for serving as a personal representative; and
- Compensation payable to the personal representative is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services rendered to the personal representative.

However, for these disclosures to be sufficient, the testator must execute a written statement acknowledging that the disclosures were made before the will was executed. And the written statement must substantially be in the form set forth in the bill.

The bill provides virtually identical requirements regarding an attorney who serves as a trustee and desires to be compensated both in his or her role as attorney and as a trustee.

The bill takes effect October 1, 2019, except as otherwise provided.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The bill includes several provisions that are expressly intended to apply retroactively. In all but one of these instances, the provision is described in the bill as remedial or clarifying.

The Florida Supreme Court has developed a two-prong analysis for determining whether a statute may be applied retroactively.²¹ First, there must be “clear evidence of legislative intent to apply the statute retrospectively.”²² If so, then the court moves to the second prong, “which is whether retroactive application is constitutionally permissible.”²³ Retroactive application is unconstitutional if deprives a person of due process by impairing vested rights or imposing new obligations to previous conduct:

A retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, on connection with transactions or considerations previously had or expiated.²⁴

Accordingly, a “remedial” or “procedural” statute may be applied retroactively, because these statutes do not create or destroy rights or obligations.²⁵ Instead, a remedial statute “operates to further a remedy or confirm rights that already exist” and a procedural statute provides the “means and methods for the application and enforcement of existing duties and rights.”²⁶ Finally, the Legislature’s labeling of a law as remedial or procedural does not make it so.²⁷

The bill’s provisions that are intended for retroactive application do not appear to be likely to impair vested rights. However, this analysis is inherently fact-specific, and therefore difficult to perform in the abstract. Accordingly, as these provisions are applied to myriad unique circumstances, it is possible that a court may find that one or more of the provisions has destroyed a vested right in a given case, and therefore cannot be applied retroactively in that case.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

²¹ See, e.g., *Florida Ins. Guar. Ass’n, Inc. v. Devon Neighborhood Ass’n, Inc.*, 67 So. 3d 187, 194 (Fla. 2011).

²² *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 3d 494 (Fla. 1999).

²³ *Id.*

²⁴ *Id.* at 503 (citing *McCord v. Smith*, 43 So. 2d 704, 708-09 (Fla. 1949)).

²⁵ See *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

²⁶ *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass’n, Inc.*, 127 So. 3d 1258, 1272 (Fla. 2013) (citing *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961)).

²⁷ See *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

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 731.301, 733.610, 733.617, and 736.0708 of the Florida Statutes.

This bill creates sections 689.151 and 731.1065 and 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.