

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 505 Estates and Trusts  
**SPONSOR(S):** Civil Justice Subcommittee, Driskell  
**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 358

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N, As CS	Rochester	Luczynski
2) Judiciary Committee	17 Y, 0 N	Rochester	Luczynski

### SUMMARY ANALYSIS

Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries. A will is a legal document that a person (testator) may use to determine who gets their property when they die. A personal representative, a person designated by a will or the circuit court to serve in that role, must provide a notice of administration to various parties, including family members and beneficiaries, and other entities.

CS/HB 505 revises probate laws relating to notice of administration, notice in probate proceedings, personal representative conflict of interest, and compensation of an attorney who serves as a personal representative. Specifically, the bill:

- Defines precious metals such as bullion or coins as tangible personal property;
- States that formal notice is sufficient for the court to acquire jurisdiction over a person for determining their rights to estate property; however, formal notice is insufficient to invoke the court's personal jurisdiction over the person receiving notice;
- Requires that the notice of administration served on a surviving spouse inform the surviving spouse that he or she may petition the court for an extension of time to choose the elective share;
- Requires additional notice of administration language to provide notice that a party may waive his or her right to contest a trust referenced in a will if he or she fails to timely contest the will;
- Renders voidable any sale or encumbrance to a corporation, trust, or other entity in which a personal representative or his or her spouse, agent, or attorney has a substantial beneficial or ownership interest; and
- Prohibits an attorney, or person related to the attorney, from receiving compensation for serving as a fiduciary (personal representative or trustee) if the attorney prepared or supervised the execution of the will or trust, unless the attorney:
  - Is related to the client; or
  - Makes certain disclosures to the client in writing before the will or trust is signed.

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

Except as otherwise provided, the bill has an effective date of October 1, 2020.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries. A will, very generally, is a legal document that a person (a testator) may use to determine who gets their property when they die. Wills do not dispose of all of a testator's property, but only their estate, or those assets that are subject to probate administration.<sup>1</sup> Other assets are disposed of outside of probate.

Without a will, a decedent's estate is distributed pursuant to the intestacy statutes, which devise<sup>2</sup> a decedent's estate according to default rules. With a will, however, a testator may devise the estate to whomever they prefer.

In order for the decedent's estate to be transferred to heirs or to the beneficiaries of the will, a petition for administration must be filed with the circuit court.<sup>3</sup> A personal representative, a person designated by the will or the circuit court to serve in that role, must provide a notice of administration to various parties, including family members, beneficiaries, and other entities.<sup>4</sup> The personal representative must search for and provide notice to the decedent's creditors.<sup>5</sup> In order for personal representatives to claim monies from bank accounts for the estate, the court must issue letters of administration granting the personal representative the authority to act on the estate's behalf. The letters give the personal representative the authority to gather assets, pay a creditor, and pay an heir or beneficiary.

#### **Precious Metals and Collectible Coins**

#### Background

Tangible property is personal property that can be felt or touched, such a motor vehicle, jewelry, or furniture. Intangible property is personal property that has no physical existence, such as a stock, a bond, a patent, or a trademark. Intangible property is not intrinsically valuable, but is representative or evidence of value. Tangible personal property is subject to devise by a tangible personal property clause in a will or a separate writing, while intangible property generally passes in accordance with a residuary clause in a will, in the absence of other specific direction.<sup>6</sup> Florida law does not specify whether certain types of precious metals, such as coins and bullion,<sup>7</sup> constitute tangible personal property or intangible property.

#### Effect of Proposed Changes

CS/HB 505 defines precious metals in any tangible form, such as bullion or coins kept apart from their normal use as legal tender for payment, as tangible personal property. The bill applies to a written will or codicil and a proceeding pending or commenced before or after July 1, 2020, in which the disposition of precious metals in a tangible form has not been finally determined.

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<sup>1</sup> S. 732.201(14), F.S.

<sup>2</sup> To devise means to dispose of real or personal property by will or trust. S. 731.201(10), F.S.

<sup>3</sup> S. 733.202, F.S.

<sup>4</sup> S. 733.212, F.S.

<sup>5</sup> S. 733.2121, F.S.

<sup>6</sup> Jennifer Hillman, *Tangible Personal Property: What Does it Encompass?* (Jan. 12, 2015),

<https://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/posts/tangible-personal-property-what-does-it-encompass> (last visited Jan. 20, 2020).

<sup>7</sup> Bullion is gold or silver in bulk before coining, or valued by weight.

The definition provides clarity in circumstances where the will does not specify what tangible personal property is and no other evidence of the testator's intent is apparent.

## Notice to Interested Persons

### Background

#### *Jurisdiction*

Jurisdiction is the power of a court to adjudicate a case. There are three components of jurisdiction:

- Subject matter jurisdiction;
- Territorial jurisdiction; and
- Personal jurisdiction.<sup>8</sup>

Subject matter jurisdiction is the court's authority to decide the issue in controversy, such as a contracts or a civil rights issue.<sup>9</sup> Territorial jurisdiction is the court's power over events and persons within the boundaries of a particular geographic territory. If a court does not have territorial jurisdiction over the events or persons within it, the court cannot bind a defendant to an obligation or adjudicate any rights.<sup>10</sup> Personal jurisdiction refers to a court's authority to make a decision regarding the party being sued in a case. There are three types of personal jurisdiction:

- *In personam* jurisdiction;
- *In rem* jurisdiction; and
- *Quasi in rem* jurisdiction.<sup>11</sup>

*In personam* refers to courts' power to adjudicate matters directed against a party. A court with jurisdiction over a particular location may exercise *in personam* jurisdiction over a person who resides, maintains connections, or is served notice of legal proceedings in that location. *In rem* jurisdiction refers to the power of a court to adjudicate matters over real or personal property. *Quasi in rem* jurisdiction refers to a court's authority over a party who owns property within the court's jurisdictional boundaries.<sup>12</sup>

#### *Formal Notice and Summons*

Formal notice may be served by sending a copy of a pleading or motion to an interested person by any commercial delivery service or mail carrier requiring a signed receipt.<sup>13</sup> A sheriff's deputy or process server may serve a summons by delivering a copy to the interested person's home, leaving it with any person residing there who is age 15 or older and informing the person of its contents.<sup>14</sup> Currently, formal notice in a probate proceeding is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's estate interest or in the decedent's protected homestead.<sup>15</sup>

### Effect of Proposed Changes

CS/HB 505 states that formal notice is sufficient for the court to acquire jurisdiction over a person for determining their rights to estate property; however, formal notice is insufficient to invoke the court's personal jurisdiction over the person receiving notice. As a result, a petitioner must obtain personal jurisdiction over an adverse party by service of a summons, under ch. 48, F.S. These provisions are

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<sup>8</sup> Legal Information Institute, *Jurisdiction*, <https://www.law.cornell.edu/wex/jurisdiction> (last visited Jan. 20, 2020).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Fla. R. Prob. P. 5.040.

<sup>14</sup> A process server is a person authorized to serve initial nonenforceable civil process on a person found within the circuit where the process server is certified when a civil action has been filed against such person in the circuit court or in a county court in the state. Ss. 48.27, 48.031, and 48.201, F.S.

<sup>15</sup> S. 731.301, F.S.

effective upon becoming law and apply to all proceedings pending on or before, or commenced after that date.

## Notice of Administration

### Background

Upon appointment, a personal representative must serve a notice of administration on a surviving spouse, beneficiaries, and other interested parties.<sup>16</sup> A notice of administration is a formal document that notifies all interested parties:

- Of the decedent's death;
- Of the will's filing in probate court;
- Of the rights and responsibilities relating to the estate; and
- That an objection to the validity of the will and the probate proceedings must be filed within a certain period of time or be forever barred.<sup>17</sup>

### *Right to Take Elective Share*

Under Florida law, a decedent may not intentionally disinherit a spouse unless the spouse previously agreed in a prenuptial or postnuptial agreement. A surviving spouse has the right to receive a portion of their deceased spouse's estate called the "elective share." An elective share is intended to protect a surviving spouse who has been disinherited or left only a small portion of the estate.<sup>18</sup> The surviving spouse may choose the greater of what was provided in the will or what Florida law provides. The elective share is equal to 30 percent of the deceased spouse's elective estate. The elective estate includes:

- The decedent's probate estate;<sup>19</sup>
- Homestead property;
- Joint bank accounts and pay on death accounts;
- Decedent's fractional interest in jointly held property;
- Revocable trusts;
- Certain irrevocable transfers, including transfers with retained right to income or principal or retained right to discretionary principal distributions;
- Life Insurance policies payable to someone other than surviving spouse;
- Pensions and retirement plans;
- Property passing directly to surviving spouse.<sup>20</sup>

A notice of administration must state that an election to take an elective share must be filed on or before the earlier of:

- Six months after the date of service of a copy of the notice of administration on the surviving spouse; or
- Two years after the date of the decedent's death.<sup>21</sup>

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<sup>16</sup> S. 733.212, F.S.

<sup>17</sup> *Id.*

<sup>18</sup> HG Legal Resources, *Florida's Elective Share Statute* (2019), <https://www.hg.org/legal-articles/florida-s-elective-share-statute-24435> (last visited Jan. 20, 2020).

<sup>19</sup> A Probate Estate is defined as "all property wherever located that is subject to estate administration in any state of the United States or in the District of Columbia." S. 732.2025, F.S.

<sup>20</sup> S. 732.2035, F.S.

<sup>21</sup> S. 733.212(2), F.S.

Section 732.2135, F.S., allows a surviving spouse to petition the court for a time extension to make an election if the petition is made within:

- Six months after the date of service of a copy of the notice of administration on the surviving spouse; or
- Two years after the date of the decedent's death.

The notice of administration need not state that a spouse has the right to petition the court for a time extension.

### *Right to Contest Trust Incorporated in a Will*

A timely will contest is required to challenge a trust that is incorporated in a will.<sup>22</sup> A party seeking to contest a will has three months from the date of service of a notice of administration to object to the validity of the will.<sup>23</sup> However, if a trust is incorporated by reference into the will, and the party seeks to contest the trust, a timely will contest is likely required, even if the contestant does not contest the validity of the will apart from the terms that incorporate the contested trust.<sup>24</sup> This may confuse a beneficiary as he or she may also receive a trust limitation notice stating there is a six month deadline to object to the trust in addition to a notice of administration stating there is a three month deadline to object to the will.<sup>25</sup>

### Effect of Proposed Changes

CS/HB 505 requires that notice of administration served on a surviving spouse inform the surviving spouse that he or she may petition the court for an extension of time to choose the elective share. The bill also requires additional notice of administration language to provide notice that a party may waive his or her right to contest a trust referenced in a will if he or she fails to timely contest the will.

## **Personal Representative Conflict of Interest**

### Background

A personal representative is a fiduciary appointed by the court to administer an estate. A personal representative is liable to an interested person for damage or loss resulting from a breach of fiduciary duty.<sup>26</sup>

Unless a will or contract entered into by the decedent expressly authorizes the transaction or the court approves the transaction after notice to interested persons; an interested party may void a sale or encumbrance to a:

- Personal representative;
- Personal representative's spouse, agent, or attorney; or
- Corporation or trust in which the personal representative has a substantial beneficial interest.<sup>27</sup>

### Effect of Proposed Changes

CS/HB 505 renders voidable a 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. This protects a beneficiary's estate interest by allowing them to void a transaction if it arose out of a conflict of interest.

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<sup>22</sup> *Pasquale v. Loving, et. al.*, 82 So. 3d 1205 (Fla. 4th DCA 2012).

<sup>23</sup> S. 733.212, F.S.

<sup>24</sup> *Pasquale v. Loving, et. al.*, 82 So. 3d at 1205.

<sup>25</sup> S. 736.1008, F.S. A trust limitation notice is a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later.

<sup>26</sup> S. 733.602, F.S.

<sup>27</sup> S. 733.610, F.S.

## Attorneys Serving as Personal Representatives or Trustees

### Background

A licensed attorney who serves as a personal representative of an estate and renders legal services in the administration of the estate is permitted a fee for the legal services, in addition to his or her fee as personal representative.<sup>28</sup> However, the fee for legal services must be considered when determining the attorney's compensation for non-legal services as personal representative.<sup>29</sup> 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 trustee compensation.<sup>30</sup>

### Effect of Proposed Changes

CS/HB 505 prohibits an attorney, or person related to the attorney, from receiving compensation for serving as a fiduciary (personal representative or trustee) if the attorney prepared or supervised the execution of the will or trust, unless the attorney:

- Is related to the client; or
- Makes the following disclosures to the client in writing before the will or trust is signed:
  - Subject to limited exceptions, a corporate fiduciary or any person, including a spouse, an adult child, a friend, or an attorney, is eligible to serve as a fiduciary;
  - Any person, including an attorney, who serves as a fiduciary is entitled to receive reasonable compensation, and
  - Compensation payable to the fiduciary is in addition to any attorneys' fees payable to the attorney or the attorney's firm for legal services.

For these disclosures to be sufficient, the testator must execute a written statement acknowledging that the disclosures were made prior to the will or trust's execution. The written acknowledgment must be in a separate writing from the will or trust, but it may be annexed to the will or trust. The written acknowledgment may be executed before or after the execution of the will or trust.

The statutes do not affect the validity of the instrument and do not disqualify the named fiduciary from serving. Thus, the attorney can serve without a signed acknowledgment. However, the service will be without compensation to the fiduciary.

### B. SECTION DIRECTORY:

**Section 1:** Creates s. 731.1065, F.S., relating to precious metals.

**Section 2:** Amends s. 731.201, F.S., relating to general definitions.

**Section 3:** Amends s. 731.301, F.S., relating to notice.

**Section 4:** Creates an unnumbered section providing applicability.

**Section 5:** Amends s. 733.212, F.S., relating to notice of administration; filing of objections.

**Section 6:** Amends s. 733.610, F.S., relating to sale, encumbrance, or transaction involving conflict of interest.

**Section 7:** Amends s. 733.612, F.S., relating to transactions authorized for the personal representative; exceptions.

**Section 8:** Amends s. 733.617, F.S., relating to compensation of personal representative.

**Section 9:** Amends s. 736.0708, F.S., relating to compensation of trustee.

**Section 10:** Provides an effective date of October 1, 2020, except as otherwise provided.

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<sup>28</sup> S. 733.617, F.S.

<sup>29</sup> S. 733.612(19), F.S.

<sup>30</sup> S. 733.0708(3), F.S.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### 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. This 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

On December 12, 2019, the Civil Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Clarified that although formal notice is sufficient for court to exercise in rem jurisdiction, a court does not acquire personal jurisdiction over a person by service of formal notice; and
- Removed a provision giving a personal representative the exclusive authority to pursue causes of action on behalf of the estate.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.