

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 Judiciary Committee

BILL: SB 1146

INTRODUCER: Senator Simmons

SUBJECT: Effect of Dissolution or Annulment of Marriage on Certain Designations

DATE: January 24, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	Pre-meeting
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

The bill generally nullifies upon divorce or annulment the designation of a spouse as a beneficiary of nonprobate assets such as life insurance policies, individual retirement accounts, and payable on death accounts. If the provisions of the bill apply, an asset will pass as if the former spouse predeceased the decedent.

The bill also specifies criteria for a payor of a nonprobate asset to use in identifying the appropriate beneficiary. The bill specifically provides that the payor is not liable in some circumstances for transferring an asset to the beneficiary identified through the bill's criteria.

Lastly, the bill generally terminates upon the termination of a marriage the authority of a spouse under an advance directive to serve as a health care surrogate or to serve a surrogate for the purposes of a living will.

This bill creates the following sections of the Florida Statutes: 732.703, 765.2021, and 765.3031, Florida Statutes.

II. Present Situation:

Disposition of Nonprobate Assets

Chapters 731 to 735, F.S., are known as the “Florida Probate Code.”¹ Substantive rights regarding probate are covered in the probate code and procedural matters are governed by probate rules adopted by the Florida Supreme Court.

Chapter 732, F.S., governs substantive issues relating to wills. A provision of a will executed before the dissolution or annulment of a marriage which provides for a former spouse is void.² A court will interpret the will as if the former spouse “had died at the time of the dissolution, divorce, or annulment of the marriage, unless the will or the dissolution or divorce judgment expressly provides otherwise.”³ A similar provision exists for trusts. If a revocable trust is created by a husband or wife as settlor before the entry of a judgment for a divorce or annulment of a marriage, then any provision of the trust that affects the divorced spouse is void unless the trust provides otherwise.⁴

In contrast, nonprobate assets⁵ typically are transferred by the designation of a beneficiary as provided in the contract.⁶ If an individual designates his or her spouse as beneficiary on the individual’s life insurance policy or other nonprobate asset, divorces the spouse, and fails to modify the beneficiary designated on the policy, the former spouse will receive the policy’s proceeds upon the individual’s death. Nonprobate assets are widely used as a tool for estate planning.⁷

Litigation has ensued to determine the disposition of nonprobate assets in instances where an individual who owns nonprobate assets, divorced, and later failed to remove the former spouse as beneficiary for the assets.⁸ In that litigation, the Florida Supreme Court held that a former spouse as named beneficiary was entitled to term life insurance proceeds despite a general release in a marital settlement agreement.⁹ The Court reasoned that the determination of who is entitled to the assets depends on the plain language in the insurance contract designating a beneficiary when a marital settlement agreement fails to specifically remove the former spouse.¹⁰

¹ Section 731.005, F.S.

² Section 732.507(2), F.S. *See also*, Henry P. Trawick, Jr., *Trawick’s Redfearn Wills and Administration in Florida*, s. 3:10 (2009-2010 ed.).

³ Section 732.507(2), F.S.

⁴ Section 736.1105, F.S.

⁵ “Nonprobate asset” means “[p]roperty that passes to a named beneficiary upon the owner’s death according to the terms of some contract or arrangement other than a will. Such an asset is not a part of the probate estate and is not ordinarily subject to the probate court’s jurisdiction (and fees), though it is part of the taxable estate. Examples include life-insurance contracts, joint property arrangements with right of survivorship, pay-on-death accounts, and inter vivos trusts.” BLACK’S LAW DICTIONARY (9th ed. 2009).

⁶ *Id.*

⁷ *See* Suzanne Soliman, *A Fair Presumption: Why Florida Needs a Divorce Revocation Statute for Beneficiary-Designated Nonprobate Assets*, 36 STETSON L. REV. 397, 397 (Winter 2007).

⁸ Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death* (on file with the Senate Committee on Judiciary).

⁹ *Cooper v. Muccitelli*, 682 So. 2d 77, 79 (Fla. 1996).

¹⁰ *Id.*

In a subsequent case, the Florida Supreme Court explained that:

absent the marital settlement agreement providing who is or is not to receive the death benefits or specifying who is to be the beneficiary, courts should look no further than the named beneficiary in the separate document of the policy, plan, or account. General language in a marital settlement agreement, such as language stating who is to receive ownership, is not specific enough to override the plain language of the beneficiary designation in the separate document. The spouse, who owns the policy, plan, or account following the dissolution of marriage, is otherwise free to name any individual as the beneficiary; however, if the spouse does not change the beneficiary, the beneficiary designation in the separate document controls.¹¹

Health Care Advance Directives

Chapter 765, F.S., details the requirements for health care advance directives. An “advanced directive” is “a witnessed written document or oral statement in which instructions are given by a principal or in which the principal’s desires are expressed concerning any aspect of the principal’s health care, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift.”¹²

Chapter 765, F.S., outlines substantive rights and procedures for a “competent adult to make an advance directive instructing his or her physician to provide, withhold, or withdraw life-prolonging procedures, or to designate another to make the treatment decision for him or her in the event that such person should become incapacitated and unable to personally direct his or her medical care.”¹³

A competent adult may amend or revoke an advance directive or designation of a surrogate¹⁴ at any time by means of any of the following:

- a signed, dated written document.¹⁵
- the physical cancellation or destruction of the advance directive by the principal or by another person in principal’s presence and at the principal’s direction.¹⁶
- an oral expression of an intent to revoke.¹⁷
- execution of a subsequent advance directive that is materially different from the previously executed advanced directive.¹⁸

¹¹ *Crawford v. Barker*, 64 So. 3d 1246, 1248 (Fla. 2011).

¹² Section 765.101(1), F.S.

¹³ Section 765.102(3), F.S.

¹⁴ “Surrogate” means “any competent adult expressly designated by a principal to make health care decisions on behalf of the principal upon the principal’s incapacity.” Section 765.101(16), F.S.

¹⁵ Section 765.104(1)(a), F.S.

¹⁶ Section 765.104(1)(b), F.S.

¹⁷ Section 765.104(1)(c), F.S.

¹⁸ Section 765.104(1)(d), F.S.

The dissolution or annulment of marriage of the principal¹⁹ automatically revokes the designation of the principal's spouse as the surrogate.²⁰

Chapter 765, F.S., sets forth a procedure for the designation of a proxy to make health care decisions under certain circumstances for an incapacitated or developmentally disabled patient. Specifically, under s. 765.104, F.S.:

- (1) If an incapacitated or developmentally disabled patient has not executed an advance directive, or designated a surrogate to execute an advance directive, or the designated or alternate surrogate is no longer available to make health care decisions, health care decisions may be made for the patient by any of the following individuals, in the following order of priority, if no individual in a prior class is reasonably available, willing, or competent to act:
- The judicially appointed guardian of the patient or the guardian advocate of the person having a developmental disability ... who has been authorized to consent to medical treatment, if such guardian has previously been appointed;
 - The patient's spouse;
 - An adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
 - A parent of the patient;
 - The adult sibling of the patient or, if the patient has more than one sibling, a majority of the adult siblings who are reasonably available for consultation;
 - An adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and who is familiar with the patient's activities, health, and religious or moral beliefs; or
 - A close friend of the patient.²¹

A clinical social worker licensed in Florida or who is a graduate of a court-approved guardianship program may also be selected by the health care provider's bioethics committee to serve as a proxy under additional procedures outlined in s. 765.104, F.S.

III. Effect of Proposed Changes:

Section 1. (Effect of Dissolution or Annulment of Marriage on Designation of Beneficiary for Certain Nonprobate Assets)

The bill voids the designation of a former spouse as a beneficiary of an interest in an asset that will be transferred or paid upon the death of the decedent if:

¹⁹ Section 765.101(14), F.S., defines "principal" to mean "a competent adult executing an advance directive and on whose behalf health care decisions are to be made."

²⁰ Section 765.104(2), F.S., states "[u]nless otherwise provided in the advance directive or in an order of dissolution or annulment of marriage, the dissolution or annulment of marriage of the principal revokes the designation of the principal's former spouse as a surrogate."

²¹ Section 765.401, F.S.

- The decedent's marriage was judicially dissolved or declared invalid before the decedent's death; and
- The designation was made before the dissolution or order invalidating the marriage.

The decedent's interest in the asset must pass as if the decedent's former spouse predeceased the decedent. The nonprobate assets covered by the bill include:

- a life insurance policy, qualified annuity, or other similar tax-deferred contract held within an employee benefit plan;
- an employee benefit plan;
- an individual retirement account;
- a payable-on-death account;
- a security or other account registered in a transfer-on-death form; and
- a life insurance policy, annuity or other similar contract that is not held within an employee benefit plan or tax-qualified retirement account.

However, the bill does not void a beneficiary designation:

- to the extent federal law provides otherwise;
- if the governing instrument as defined in the bill²² expressly provides that the interest will be payable to the designated former spouse after the order of dissolution or order declaring the marriage invalid and the instrument expressly provides that benefits will be payable to the decedent's former spouse;
- to the extent the disposition of the assets are governed by a will or trust;
- if a court order required the decedent to acquire or maintain the asset for the benefit of the former spouse or children of the marriage;
- if under terms of the order of dissolution or order declaring the marriage invalid, the decedent did not have the ability to unilaterally terminate or change the beneficiary or pay-on-death designation;
- if the designation of the decedent's former spouse as beneficiary is irrevocable under applicable law;
- if the contract or agreement is governed by the laws of another state;
- to an asset held in two or more names as to which the death of one co-owner vests ownership of the asset in the surviving co-owner or co-owners; or
- if the decedent remarries the person whose interest would otherwise have been revoked as a former spouse under the bill and the decedent and that person are married to one another at the time of the decedent's death.

Payment Procedures

The bill outlines procedures and requirements for entities making payment of the decedent's interest in the following nonprobate assets: a life insurance policy, qualified annuity, or other

²² "Governing instrument" is defined in the bill to mean "any writing or contract governing the disposition of all or part of an asset upon the death of the decedent."

similar tax-deferred contract held within an employee benefit plan; an employee benefit plan; or an individual retirement account.

If the governing instrument does not explicitly specify the relationship between the beneficiary designated in the instrument and the decedent, or if the governing instrument explicitly provides that the beneficiary is not the decedent's spouse, the payor is not liable for making any payment or transferring any interest in the account to the beneficiary.

If the governing instrument specifies the *primary beneficiary as the spouse of the decedent*, the payor must examine the death certificate. If the death certificate provides that the decedent was married to the named beneficiary at the time of death, the payor may pay out the benefits to the named beneficiary. If the death certificate states that the decedent was not married, or was married to another individual other than the person specified on the account as the spouse, the payor is not liable for paying or transferring the interest in the asset to the secondary beneficiary under the governing instrument.

If the death certificate is silent as to the marital status of the decedent, the bill provides for the use of two form affidavits. One affidavit may be executed by an individual alleging to be the surviving spouse of the decedent. If the alleged surviving spouse executes the affidavit, certifying that he or she is the surviving spouse of the decedent and that the decedent was married to him or her at the time of the decedent's death, the payor is not liable for paying the account to such individual. The second affidavit may be executed by a secondary beneficiary who must certify that the primary beneficiary was not married to the decedent at the time of the decedent's death. The payor may also pay out the interest to the secondary beneficiary upon receipt of a properly executed affidavit.

Payors' Liability Extinguished

The bill provides that in the case of pay-on-death accounts, securities or other accounts registered in transfer-on-death form, and life insurance policies, annuities or other similar contracts not held within an employee benefit plan or a tax-qualified retirement account, the payor is not liable for making any payment on account of, or transferring any interest in, such assets to any beneficiary.²³

A payor's immunity for making a payment in accordance with the criteria in the bill applies notwithstanding the payor's knowledge that the person to whom the asset is transferred is different from the person who would own the interest due to the dissolution of the decedent's marriage or declaration of the marriage's validity before the decedent's death. As such, a secondary beneficiary will have a cause of action against the former spouse who receives the payment or transfer of the assets described in the bill if the beneficiary designations was made void upon divorce or annulment.²⁴

²³ This bill is not intended to impose any additional due diligence requirements, requirements to review death certificates, on the payors of the assets described in s. 732.703(6), F.S. Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death* (on file with the Senate Committee on Judiciary).

²⁴ "The primary purpose of [s. 732.703, F.S.] is to create the basis for a cause of action for accounts that are paid out to former spouses as opposed to intended beneficiaries." Real Property, Probate, and Trust Law Section of The Florida Bar,

The bill does not affect the ownership of an interest in an asset as between the former spouse and any other person entitled to such interest, the rights of any purchaser for value of any such interest, the rights of any creditor of the former spouse or any other person entitled to such interest, or the rights and duties of any insurance company, financial institution, trustee, administrator, or other third party.

The provisions of the bill, relating to beneficiary designations, apply to all designations made by or on behalf of decedents dying on or after July 1, 2012, regardless of when the designation was made.

Section 2. (Advance Directive-Health Care Surrogate)

The bill provides that upon dissolution of a marriage, a former spouse's authority as a health care surrogate terminates upon the dissolution or annulment of the marriage, unless the document or the final judgment of dissolution provides otherwise. After the dissolution or annulment, the document designating a health care surrogate must be administered as if the former spouse predeceased the other spouse and is unable to perform his or her duties.

This section applies to all final judgment of dissolution or annulment entered on or after July 1, 2012.

Section 3. (Advance Directive- Living Wills)

The bill creates s. 765.3031, F.S., to provide that upon dissolution of a marriage, a former spouse's authority as a surrogate for the other spouse under a living will terminates upon the dissolution or annulment of the marriage, unless the document or the final judgment of dissolution provides otherwise. After the dissolution or annulment, the living will must be administered as if the former spouse predeceased the other spouse and is unable to perform his or her duties.

This section applies to all final judgment of dissolution or annulment entered on or after July 1, 2012.

Section 4. The bill provides an effective date of July 1, 2012.

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.

B. Private Sector Impact:

Companies that administer the nonprobate assets covered by the bill may incur additional costs to implement the bill. Such costs are difficult to estimate.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Sections 2 and 3 of the bill remove the designation of a former spouse to make health care decisions under an advance directive if an individual becomes incapacitated and is unable to direct his or her medical care or to make decisions regarding the withholding or withdrawal of life-prolonging procedures. It appears that current law already addresses this circumstance in s. 765.104(2), F.S., which states, "Unless otherwise provided in the advance directive or in an order of dissolution or annulment of marriage, the dissolution or annulment of marriage of the principal revokes the designation of the principal's former spouse as a surrogate."

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.