

**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.)

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Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

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BILL: CS/SB 358

INTRODUCER: Judiciary Committee and Senator Berman

SUBJECT: Decedents' Property

DATE: December 9, 2019

REVISED: \_\_\_\_\_

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

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 358 amends several sections of the probate code relating to compensation of attorneys who serve as personal representatives, which persons may sue to recover property for the estate, 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.

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;
- Prohibits an attorney who prepared or supervised the preparation of a trust from being compensated as a trustee unless the attorney is a relative of the "settlor" (trust creator) or makes specified disclosures to the settlor before the trust is created;
- Provides that causes of action that a decedent held at death are estate property, and therefore subject to the control and possession of the personal representative (not the beneficiaries);
- 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;
- Clarifies what constitutes sufficient notice for a court to exercise personal jurisdiction over a person in a probate proceeding; and
- Categorizes as tangible property bullion and coins, such as collectible coins, that are not used as money.

## II. Present Situation:

### Conflict of Interests by Personal Representatives

Several types of transactions that involve a conflict of a personal representative's interests are voidable by an interested person, except one who has consented after fair disclosure.<sup>1</sup> However, transactions that involve a conflict of the personal representative's interests are not voidable 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.<sup>2</sup>

### 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.<sup>3</sup> However, the fee for legal services must be taken into account when determining the attorney's compensation for non-legal services as personal representative.<sup>4</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 compensation as a trustee.<sup>5</sup>

### Acquiring Jurisdiction Over a Person by Service of Formal Notice

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.<sup>6</sup>

However, the Real Property, Probate, and Trust Law Section of The Florida Bar (the Section) asserts that the personal jurisdiction contemplated in s. 731.301(2), F.S., does not include this type of proceeding.<sup>7</sup> 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.<sup>8</sup>

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<sup>1</sup> Section 733.610, F.S.

<sup>2</sup> *Id.*

<sup>3</sup> Section 733.617, F.S.

<sup>4</sup> Section 733.612(19), F.S.

<sup>5</sup> Section 733.0708(3), F.S.

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

<sup>7</sup> 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).

<sup>8</sup> *Id.*

## **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 the Section contends there is a lack of consensus among practitioners regarding this issue.<sup>9</sup> 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 bullion and collectible coins are tangible property, it is unclear whether they must be specifically disposed of pursuant to this statute.

## **Notice of Administration**

Upon being appointed, a personal representative must serve a notice of administration on a surviving spouse, beneficiaries, and other interested parties.<sup>10</sup> This document advises them of important rights and responsibilities relating to the estate.<sup>11</sup>

### ***Notice of Right to Take Elective Share***

Section 733.212(2)(e), F.S., requires that a notice of administration include a statement alerting a surviving spouse that he or she has a specified time to choose the elective share. However, the notice need not alert the spouse that he or she has the option to ask the court to extend this time.<sup>12</sup> Accordingly, the notice of administration might lead a spouse to believe he or she does not have the option to move for the extension.

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

A 2012 District Court of Appeal opinion appears to indicate that a person who wants to contest a trust that is incorporated by reference into a will must contest the will itself.<sup>13</sup> Nonetheless, the law does not expressly require a personal representative to include this fact in the notice of administration. Moreover, there are different timeframes for contesting wills and trusts, and the timeframes for contesting a will might conclude sooner than those for contesting a trust.<sup>14</sup> Accordingly, a person might have no idea that he or she must contest a will to contest a trust incorporated in the will, and might therefore fail to timely do so.

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<sup>9</sup> 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).

<sup>10</sup> Section 733.212(1), F.S.

<sup>11</sup> Section 733.212(2), F.S.

<sup>12</sup> See s. 732.2135(2), F.S.

<sup>13</sup> See *Pasquale v. Loving*, 82 So. 3d 1205, 1207 (Fla. 4th DCA 2012) (*stating* “We note, first, that the Pasquales could not challenge the validity of the trust without also contesting the will. The trust was incorporated into the 2005 will.”)

<sup>14</sup> A person may file a will contest within 3 months after receiving a notice of administration. Section 733.212(3), F.S. However, a challenge to a revocable trust within 6 months after receiving notice of the trust, or within the timeframes set forth within ch. 95, F.S., which can equate to 4 years from when a person learned of undue influence or some other basis for invalidating the trust. See s. 736.0604, F.S.; *Flanzer v. Kaplan*, 230 So. 3d 960 (Fla. 2d DCA 2017) (*stating* that the 4-year period begins to run when a beneficiary learns or should have learned of the wrongful conduct). Similarly, an action to challenge an irrevocable trust must be filed within 4 years after the person filing the action learned of or should have learned of the wrongful conduct. *Id.* at 961-62.

### **Actions for Recovery of Property Transferred Inter Vivos**

The Florida Statutes grant a personal representative the right to sue to recover property for the estate.<sup>15</sup> However, several Florida appellate courts have repeatedly indicated that this right is not exclusive, and thus that a beneficiary may also sue to recover property for the estate.<sup>16</sup> Moreover, the personal representative is not an indispensable party to every action to recover property to the estate.<sup>17</sup>

### **III. Effect of Proposed Changes:**

#### **Additional Information Required in a Notice of Administration (Section 5)**

Under the bill, just as under current law, the notice of administration must inform the surviving spouse of the standard timeframes within which he or she must choose the elective share or waive his or her right to it. However, under the bill the notice must also advise the surviving spouse that he or she may move the court for an extension of time to choose the elective share.

The bill also requires that the notice of administration state, “under certain circumstances and by failing to contest the will,” an interested person might waive his or her right to contest a *trust* that is incorporated by reference into the will.

#### **Formal Notice in a Probate Proceeding (Section 3)**

The bill provides that formal notice is sufficient notice to a person for a court to adjudicate the person’s interest in the estate property or in the decedent’s protected homestead. However, the bill specifies, this service of formal notice is not sufficient for the court to “acquire personal jurisdiction over [the] person.” So, for instance, a person given (only) formal notice could not be forced into court and made to pay damages in a probate litigation proceeding.<sup>18</sup>

#### **Causes of Action that are Subject to Possession and Control of the Personal Representative (Section 2, Section 7)**

Under the bill, the definition of “property” in the probate code is broadened to include “causes of action of the estate and causes of action the decedent had at the time of death.” Therefore, these

<sup>15</sup> Section 733.607, F.S. For example, a personal representative might sue to recover a car from a person who tricked an incapacitated testator into giving him or her the car *inter vivos*, thus precluding a beneficiary from inheriting the car unless the wrongful transfer is reversed.

<sup>16</sup> See, e.g., *Parker v. Parker*, 185 So. 3d 616 (Fla. 4th DCA 2016); but see *All Children’s Hospital, Inc. v. Owens*, 754 So. 2d 802, 806 (Fla. 2d DCA 2000) (stating that the “personal representative has specific statutory authority to recover estate assets,” and that the court “saw little value” in allowing beneficiaries to pursue their own actions to recover assets that were wrongfully transferred *inter vivos*).

<sup>17</sup> See, e.g., *Id.*; *DeWitt v. Duce*, 408 So. 2d 216 (Fla. 1981).

<sup>18</sup> According to the Real Property, Probate and Trust Law Section, the changes to s. 731.301(2), F.S., are 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. See 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). The law firm objected to the trial court’s assertion of jurisdiction because it had not been served with process.

causes of action are subject to the “possession and control” of the personal representative, just as other items of estate property are, such as the decedent’s timepiece or automobile.<sup>19</sup> Thus, it appears that the personal representative would be an indispensable party to these cases.<sup>20</sup>

### **Personal Representative’s Conflict of Interest (Section 6)**

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.

### **Compensation of a Personal Representative or Trustee Who is also an Attorney (Section 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 information 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 for disclosures and acknowledgements 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.

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<sup>19</sup> Section 733.607, F.S. *See also* s. 733.612, F.S. (granting a personal representative broad and specific authority to control estate property).

<sup>20</sup> Assuming the bill makes the personal representative indispensable in “causes of action of the estate and causes of action the decedent had at the time of death,” the bill effectively abrogates *Parker v. Parker*, 185 So. 3d 616 (Fla. 4th DCA 2016) and cases cited by the *Parker* court. In *Parker*, the Court held that the personal representative was *not* indispensable to several causes of action that were held by the decedent at death or that were otherwise causes of action of the estate, such as undue influence and replevin.

### **Precious Metals (Section 1)**

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 classification of bullion and coins clarifies current law. Accordingly, the bill states that these clarifying provisions apply to all written instruments, as well as to all probate proceedings except those proceedings in which a disposition of these items has not been finally determined.

The bill takes effect October 1, 2020, 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 two sections that are expressly intended to apply retroactively. The Florida Supreme Court has developed a two-prong analysis for determining whether a statute may be applied retroactively.<sup>21</sup> First, there must be “clear evidence of legislative intent to apply the statute retrospectively.”<sup>22</sup> If so, then the court moves to the second prong, “which is whether retroactive application is constitutionally permissible.”<sup>23</sup> Retroactive application is unconstitutional if it 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.<sup>24</sup>

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

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

<sup>23</sup> *Id.*

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

Accordingly, a “remedial” or “procedural” statute may be applied retroactively, because these statutes do not create or destroy rights or obligations.<sup>25</sup> 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.”<sup>26</sup> Finally, the Legislature’s labeling of a law as remedial or procedural does not make it so.<sup>27</sup>

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.

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 of the Florida Statutes: 731.201, 731.301, 733.212, 733.610, 733.612, 733.617, and 736.0708.

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

<sup>26</sup> *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)).

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

The bill creates section 731.1065 of the Florida Statutes.

**IX. Additional Information:**

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

**CS by Judiciary on November 5, 2019**

The committee substitute removes a provision of the bill that expressly stated that a personal representative has the exclusive right to maintain an action to recover estate property.

- B. **Amendments:**

None.