

STORAGE NAME: h0301s1b.jud

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**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: CS/HB 301

RELATING TO: Probate/Elective Share

SPONSOR(S): Committee on Real Property & Probate and Representative Goodlette

COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) REAL PROPERTY AND PROBATE YEAS 6 NAYS 1
- (2) JUDICIARY
- (3)
- (4)
- (5)

I. SUMMARY:

Current law gives a surviving spouse (or guardian of the property) the right to file for an elective share of the decedent's estate within four months from the first publication of notice of the decedent's death. The elective share equals thirty percent of the fair market value of all the decedent's property that is subject to administration, except property not located in Florida, and excluding: homestead; household furniture, furnishings and appliances up to \$10,000; automobiles held in the decedent's name; Florida Prepaid College Program and family allowances. The current elective share law also does not consider: the duration of marriage; nonprobable assets; the economic contribution made by the parties to the marriage; or **transfers of the decedent's property to any inter vivos trusts**. A decedent may effectively disinherit a surviving spouse by placing his or her assets into an inter vivos trust.

Pursuant to CS/HB 301, a spouse has the right to claim an elective share of the "elective estate" instead of the estate "subject to administration" within the earlier of 6 months from the first publication of notice of administration or within 2 years from the date of the decedent's death. The "elective estate" is broader and encompasses both probatable assets and nonprobatable assets including any inter vivos trusts. This prevents the decedent from disinheriting the surviving spouse via an inter vivos trust, absent a written agreement between the parties that the surviving spouse will waive his or her elective share. This bill excludes from the elective estate: irrevocable transfers by the decedent; transfers in which the decedent received adequate consideration; transfers made with the surviving spouse's consent; proceeds of any life insurance; one-half of the property to which ss. 732.216-.228, F.S., apply and property held in a qualifying special needs trust.¹ This bill also provides for valuation of certain properties, including the special needs trust; all other properties are to be computed at fair market value.

Unlike current law, the amount of the elective share provided for in CS/HB 301 depends upon the duration of the marriage. The amount ranges from 10 percent to 40 percent of the elective estate if married 25 years or more; or, instead of the scheduled amount, a surviving spouse may elect the lesser of \$50,000 or one-half of the elective estate. Once the amount is determined, the share is satisfied in the following order of priority: from property interests that pass outright to the spouse, or that pass in trust for the surviving spouse; from the decedent's probate estate; from property held in the decedent's revocable trust and finally from other recipients of the elective share property. If property from the elective estate is sold prior to distributing the elective share, the beneficiary is liable to the estate for that amount, not the bona fide purchaser. The court must determine the amount of elective share and order its payment. Nothing in this bill modifies the rights of spouses under ch. 61, F.S., dissolution of marriage. This bill does not have a significant fiscal impact on state or local governments.

¹ Under federal law, a surviving spouse is prohibited from receiving both an elective share and Medicaid; CS/HB 301 creates a provision allowing establishment of a "special needs trust" with court approval, before or after the decedent's death, for an incapacitated surviving spouse. This provision enables the incapacitated surviving spouse to receive monies from both the qualifying special needs trust and Medicaid upon the decedent's death.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

States use several different theories to compute a surviving spouse's elective share. In Florida, the law provides that the surviving spouse is entitled to thirty percent of the decedent's assets which are "subject to administration" upon his or her death. An inter vivos trust is not an asset "subject to administration." Therefore, under Florida law, a decedent may effectively disinherit his or her surviving spouse regardless of the length of marriage and the economic contribution made by the parties by placing assets in an inter vivos trust. Critics contend that this law creates poor public policy and encourages a spouse to file for a divorce before his or her spouse dies.² Divorce law begins with the premise of equal distribution of marital assets, and then may consider the length of marriage along with the economic contribution made by the parties. As a result, the spouse is entitled to a significantly larger portion of the estate than under the elective share law. Fla. Stat. §61.075.

To reduce these apparent inequities, some states have adopted the augmented approach. Under the augmented approach, the surviving spouse is entitled to an elective share from probatable and nonprobatable assets over which the decedent retains control. This is a broader concept and allows the surviving spouse to use an inter vivos trust to satisfy his or her elective share. However, like Florida law, this theory does not consider the duration of the marriage or any economic contribution made by the parties throughout the marriage. Therefore, the augmented approach may sustain similar criticisms as those mentioned above regarding Florida law.

In the alternative, some states use the accrual method in computing an elective share. This theory is based on the premise that a marriage is an economic partnership between spouses. The spouse is entitled to three percent per year of the combined assets of both spouses, until the elective share reaches fifty percent. In essence, this methodology takes into consideration not only the length of marriage, but the economic contributions made by the parties. In 1990, the Uniform Probate Code adopted this accrual method.

In light of the above, some states avoid the complexities of an elective share statute all together and simply classify the marital estate as "community property." Under the community property law, the spouse is entitled to fifty percent of the estate, regardless of in whose name the property is titled. Although this theory may avoid the above criticisms, it opens a new door to its own public policy concerns (e.g., a spouse receives fifty percent of the marital estate, even if he or she was married for only 6 months). The elective share theories are described below in more detail.

I. **ELECTIVE SHARE**

A. **Florida Law**

1. **Elective Share Statutes**

a. **Elective Share Rights and Restrictions**

Section 732.201, F.S., abolishes the doctrines of dower and curtesy and creates a statutory right for the surviving spouse to share in the estate of a deceased spouse. This is designated as the "elective share." There is no elective share in Florida property unless the decedent is domiciled in Florida. Fla. Stat. §732.205.

b. **Computing Amount of Elective Share**

The elective share is computed by taking into account all of the decedent's property subject to administration, except real property not located in Florida. Fla. Stat. §732.206. Pursuant to s. 732.207, F.S., the amount of the elective share must consist of **thirty percent** of the fair market value, as of the date of the decedent's death, of all assets subject to administration, after deducting:

- (1) All valid claims against the estate which are paid or payable from the estate, and

² Telephone conversation with Deborah Marks, Family Law Section of the Florida Bar, in Tallahassee, Fl. (January 27, 1999).

(2) All mortgages, liens or security interests on the decedent's assets.

c. Elective Share: Payable Assets

The elective share is payable from the assets passing under the decedent's will, which, but for the election, would have passed outright to the surviving spouse. Fla. Stat. §732.209(1). To the extent that such assets are insufficient, the share is to be paid from assets in the order prescribed in s. 733.805, F.S.³ If property must be sold to provide the elective share, the person who would otherwise be entitled to the property may purchase the property. Fla. Stat. §732.209(2). Under s. 732.208, F.S., the elective share is in addition to exempt property as provided in s. 732.401-03, F.S.⁴

d. Right of Election

The right to an elective share may be exercised by the surviving spouse or by a guardian of the property of the surviving spouse. Fla. Stat. §732.210. The election is to be filed within four months from the date of the first publication of notice of administration, except if a proceeding occurs involving the construction, admission or validity of the estate, then the surviving spouse has 40 days from the date of termination of all the proceedings in which to elect. Fla. Stat. §732.212. After the elective share is paid, the remaining assets of the estate must be distributed as though the surviving spouse had predeceased the decedent. Fla. Stat. §732.211.

e. Proceedings on the Election

Section 732.214, F.S., governs the proceedings of the election. On petition by the personal representative or the surviving spouse, the court must determine the amount of the elective share and order its payment in cash or in kind from the assets of the estate subject to the elective share. Fla. Stat. §732.214. Distribution of the elective share may be suspended upon notice by any interested party until final settlement of the federal estate tax liability. In any case where the election of the surviving spouse effects a death tax, the share of the surviving spouse will bear the additional tax. Fla. Stat. §732.215.

f. Waiver of Election

The right of election by a surviving spouse may be waived, wholly or partly, before or after marriage, by a written contract signed by the waiving party. Each spouse must make a fair disclosure of his or her estate if the agreement is signed after marriage. However, no disclosure is required for an agreement, contract or waiver signed before marriage. Fla. Stat. §732.702(1).

³ Section 733.805, F.S., provides that if a will is insufficient to provide for elective share interests, then the property of the estate shall be used for such purposes in the following order: (a) Property not disposed of by the will; (b) Property devised to a residuary devisee; (c) Property not specifically or demonstratively devised; and (d) Property specifically or demonstratively devised.

⁴ Section 732.401-03, F.S., provides that the surviving spouse takes a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of the decedent's death. Other properties exempt from the probate estate include: household furniture up to \$10,000 as of the date of decedent's death, all automobiles held in the decedent's name and Florida Prepaid College Program contracts.

g. Inter Vivos Trust

The right to transfer or devise property is a property right protected by the Florida Constitution. *Shriners Hospital for Crippled Children v. Zrillic*, 563 So.2d 64 (Fla. 1990).⁵ This right protects inter vivos transfers by a spouse. *Friedberg v. Sunbank/ Miami*, 648 So.2d 204 (Fla. 3d DCA 1994). Therefore the spouse's right to transfer property into an inter vivos trust is constitutionally protected even when the transfer is done with the intent to diminish an elective share. *Id. citing Traub v. Zlatkiss*, 559 So.2d 443, 446 (Fla. 5th DCA 1990). In enacting ss. 732.201 and 732.206, F.S., the Florida Legislature specifically limited the elective share to the probate estate. Assets included in an inter vivos trust are not subject to the probate estate administration. Thus, the trust is not subject to an elective share. *Id.*

Instead, the elective share is to be paid from those assets passing under the will which would pass outright to the surviving spouse. Fla. Stat. §732.209. To the extent these assets are insufficient to pay the elective share, then the property in the following order will be used to satisfy the elective share: property not disposed of by the will, property devised to the residuary devisee, property not specifically devised, property specifically devised. Fla. Stat. §733.805.

2. Public Policy

The elective share law promotes two essential public policies: it provides for care and maintenance of the surviving spouse, and it creates a surviving spouse's statutory claim to a portion of the decedent's estate to compensate the surviving spouse for his or her contribution to the marriage.⁶

3. Concerns

Concerns regarding the current Florida elective share law include that it:

- Allows the decedent to disinherit the surviving spouse of property held in an inter vivos trust,
- Allows a surviving spouse to destroy a decedent's otherwise sound estate plan, and
- Does not take into account the duration or economic contribution of a marriage.⁷

⁵ Property rights are protected by article 1, section 2 of the Florida Constitution:

SECTION 2: Basic rights. All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, supposition and possession of real property be aliens ineligible for citizenship may be regulated or prohibited by law. Fla. Const. art. I, § 2.

⁶ Abraham M. Mora and Sanford J. Schlesinger, *Reforming Florida's Elective Share Law: Is the Cure Worse than the Disease?*, The Florida Bar Journal at 44 (December 1998).

⁷ David F. Powell, *Proposed Changes in Florida's Elective Share Provisions, Part I*, The Florida Bar Journal at 94 (1995).

B. Augmented Estate Law

1. Definition

An augmented estate provision gives the surviving spouse the right to elect against certain nonprobatable assets over which the decedent exercised substantial control.⁸

2. New York Law

New York's elective share law provides for an augmented estate. In New York, the spouse has a right to share in the greater of \$50,000 or one-third of the net estate. The "net estate" is defined as the decedent's elective share estate, less debts, administration expenses, and reasonable funeral expenses. The decedent's "elective share estate" includes: property passing under the will or passing by intestate succession, plus various testamentary substitutes (i.e., nonprobatable assets). A few of the testamentary substitutes included in the New York elective share estate are:

- Gratuitous transfers of property made after August 31, 1992, and within one year of the decedent's death.
- Dispositions of property and contractual arrangements made by the decedent after August 31, 1992, in trust or otherwise, insofar as the decedent retained the right to the income from the property for his or her life or for an unascertainable period.
- Property payable under a thrift, savings retirement, or pension.
- Totten trust bank savings accounts.
- Joint bank accounts if created after August 31, 1966.
- Property held in joint tenancy with right of survivorship, or as tenants by the entirety.⁹

Those who are in favor of this method contend that it prevents one spouse from disinheriting a surviving spouse since the surviving spouse is given the right to claim an elective share over the assets in which the decedent retained control. Therefore, the surviving spouse has the right to reach any inter vivos trusts to satisfy the elective share.¹⁰

Those who reject this method argue that the augmented estate law carries its own concerns. For example, a spouse of a short term marriage has the same elective share entitlement as a spouse of a long term marriage. In addition, a surviving spouse who receives assets during the marriage, and is not in need of support, is still entitled to receive an elective share.¹¹

Although, this method does allow the surviving spouse to reach a revocable inter vivos trust as a part of his or her elective share, it does not take in to account the duration of the marriage which may create further inequities in the elective share law.

⁸ Abraham M. Mora and Sanford J. Schlesinger, Reforming Florida' Elective Share Law: Is the Cure Worse Than the Disease?, The Florida Bar Journal at 46 (December 1998) citing N.Y. EPTL 5-1.1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* For example: assume a husband and wife are married for the second time and both have children from prior marriages. The husband brings \$2 million to the marriage and the wife brings \$1 million to the marriage. Six months after the marriage, the husband dies. Assume that the wife claimed the state law percentage for an augmented estate share, which would provide her with an elective share of \$300,000. The wife does not need the money for her support. As a result, no valid public policy is promoted. *Id.* at 46.

C. Accrual Method

The accrual method is premised on the view that marriage is an economic partnership between spouses. (This view is similar to that under family law applied to a divorce.) Under the accrual method, the spouse's right to an elective share increases with the duration of marriage. The elective share accrues at a rate of three percent per year until the eleventh year, or thirty-three percent. During the twelfth year of marriage, the elective share begins to accrue at a rate of four percent per year until the share reaches fifty percent. The percent accrued is applied toward the combined probate and nonprobate assets of both the decedent and the surviving spouse.¹²

Supporters of the accrual method agree that this method views marriage as an "economic partnership between spouses." This premise is similar to that set forth in the event of a divorce under s. 61.075, F. S., in that, it accounts for nonprobate assets and duration of marriage. In long marriages, the spouse is entitled to one-half of the estate.¹³

Those who do not support this method reject it on the grounds that it creates complex administrative problems. It is difficult to calculate the size of an elective share unless both spouses disclose all of their assets. In addition, this method may increase litigation regarding valuation of assets, similar to that in divorce proceedings.¹⁴

Although this method takes in to consideration nonprobate assets and the duration of a marriage, it assumes that both spouses would be forthright in their disclosure of assets.

D. Uniform Probate Code

In 1974, the Uniform Probate Code (UPC) provided that a surviving spouse may elect to take one-third of the decedent's augmented estate. The augmented estate included the probate estate and inter vivos trusts, less expenses, allowances, exemptions, and claims, and increased by inter vivos transfers of which the decedent retained control. UPC, Augmented Estate, § 2-202, 1974.

The Uniform Probate Code, as amended in 1990, provides for an accrual method. Under this method, the spouse's elective share right accrues at the rate of three percent per year for the first eleven years. Then the right accrues at the rate of four percent per year until it reaches a maximum of fifty percent.¹⁵

II. FAMILY LAW: DIVORCE

Critics contend that both the existing elective share law and this bill encourage divorce and poor public policy.¹⁶ In the event of a divorce, a court must begin with the premise that distribution of marital assets should be equal. Fla. Stat. §61.075. If the distribution cannot be equal, then the court is to consider all of the relevant factors, including:

→ Contribution to the marriage by each spouse, including contributions to the children;

¹² *Id.*

¹³ For example, assume that the decedent contributed \$1,000,000 in assets held in a revocable inter vivos trust. Also, assume that the wife owned \$500,000 in assets. The couple was married for 30 years at the decedent's death. Under this theory, the elective share percentage would be fifty percent. Accordingly, the surviving spouse would be entitled to \$750,000 as an elective share. Since the surviving spouse already owned \$500,000 in assets, the spouse is entitled to \$250,000 as a result of the elective share. *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 46.

¹⁶ Telephone conference with Deborah Marks, Family Law Section of the Florida Bar, in Tallahassee, FL. (January 27, 1999).

- The economic circumstances of the parties;
- The duration of the marriage;
- The interruption of personal careers or educational opportunities of either party;
- The contribution of one spouse to the personal career or educational opportunity of the other spouse;
- The desirability of retaining any asset;
- The contribution of each spouse to the acquisition, enhancement and production of income or to the improvement of marital assets;
- The desirability of retaining the marital home;
- The intentional dissipation, waste, depletion or destruction of marital assets; and
- Any other relevant factors necessary to do equity and justice between parties. Fla. Stat. §61.075.

Under divorce law, a spouse is entitled to an equitable distribution of what he or she contributed to the marriage. As a result, a spouse would be entitled to a significantly larger portion of the marital assets in the event of a divorce than under the elective estate law. Thus, the critics contend that the current elective share law encourages divorce before a spouse dies.

Proponents of this bill contend, that on the other hand, it is unlikely that the court would award the surviving spouse any support should his or her marriage have only lasted 6 months. However, under the elective share law, the surviving spouse would be entitled to thirty percent of a decedent's probate estate.

III. COMMUNITY PROPERTY LAW

States with community property law allow the surviving spouse to receive fifty percent of the entire marital estate regardless of in whose name it is titled. The community property law is generally used as a substitute to the elective share law. Under the community property law, there are three classifications of property: quasi-community property, community property and separate property.¹⁷

- Quasi-community property is property that was acquired while the spouses lived in a common law state and then brought the property into a community property state. Some states treat this property as community property for both probate and divorce, others treat it as community property for either probate or divorce, but not both.
- Community property is "classified as property acquired by a spouse during marriage, except property acquired by gift, devise or descent." Included in this definition is any and all compensation and income earned or generated during the marriage.
- Separate property is acquired prior to marriage or acquired during the marriage by devise, gift or descent.

Those who favor the community property law claim that there is no need for an elective share since the surviving spouse is automatically owner of one-half of the decedent's estate regardless of in whose name it is titled.¹⁸

¹⁷ *Reforming, supra.*

¹⁸ *Reforming, supra.* at 47.

Although this method may curtail certain criticisms, it carries its own public policy and constitutional concerns. The community property law may lead to commingling of assets; create concerns with tracing asset ownership; restrict testamentary freedom; and create concerns regarding titling and valuing property. In addition, this method may create inequities in shorter term marriages, e.g., where a couple is married for only six months yet each spouse is still entitled to one-half of the marital assets.¹⁹

B. EFFECT OF PROPOSED CHANGES:

See "Section-by-Section Analysis."

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No

(3) any entitlement to a government service or benefit?

No

b. If an agency or program is eliminated or reduced:

An agency is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

¹⁹ *Proposed Changes, supra.* at 94.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/ associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Judiciary Committee Staff Comments:

Yes. An individual's right to devise property through an inter vivos trust may be limited, regardless of the needs (or lack thereof) of a surviving spouse. Certain other lawful forms of ownership may be penalized by inclusion in the elective share.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

This bill does not purport to provide services to families or children.

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

Judiciary Committee staff comments:

Yes. Limitations are placed upon a spouse's right to dispose of property through an inter vivos trust regardless of the independent financial status of the spouse. For spouses who remain married for a religious reason only, and who have no daily interaction, the amount of assets subject to the elective share continues to increase, although no further contributions are made to the financial success of the marriage.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

This bill creates the following sections in the Florida Statutes: 732.2025; 732.2035; 732.2045. This bill amends sections 732.201 and 732.205 - 732.215.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Right to elective Share

Current Law

Section 732.201, F.S., provides that the surviving spouse shall have the right to a share of the estate of the deceased spouse.

Effect of Proposed Changes

Amends s. 732.201, F.S., by providing technical changes, and specifies that the surviving spouse has a right to a share of the "elective estate" which is further defined in this bill.

Section 2. Definitions

Current Law

Part II, ss. 732.201-.278, F.S., sets forth the elective share law. None of those sections provide for definitions.

Section 738.12, F.S., provides, in part, that if the total principal of a trust does not in a year yield a net income of at least 3 percent of its market value, the trustee shall pay to the income beneficiary an amount equal to the excess of 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year, over the trust income paid to the income beneficiary in that year. This amount is to be paid to the income beneficiary using the first principal cash available.

Effect of Proposed Changes

Creates s. 732.2025, F.S., which defines the following terms: direct recipient; general power of appointment; governing instrument; payor; person; probate estate; revocable trust; and transfer tax value.

In addition, this section defines "elective share trust" as a trust where: the surviving spouse is entitled to the use of the property or to all the income payable at least as often as annually; the trust is subject to the provisions of s. 738.12, F.S.; or the surviving spouse has the right to make the property productive or convert it within a reasonable amount of time. This section also defines "transfer in satisfaction of the elective share" as an irrevocable transfer by the decedent to an elective share trust.

Lastly, this section defines "qualifying special needs trust" as a trust established, before or after the decedent's death, with court approval, where the income and principal is distributable to the benefit of the incapacitated surviving spouse for life, in the discretion of one or more trustees (less than half of whom are ineligible family trustees),²⁰ and during the spouse's life, when no one other than that spouse has the power to distribute the income to anyone else other than the spouse.

Section 3. Property entering the elective estate

Current Law

Section 732.206, F.S., provides that the elective share shall be computed by taking into account all property of the decedent wherever located that is subject to administration, except real property not located in Florida. The elective share consists of thirty percent of the fair market value of all assets of the decedent which are subject to administration, less: all valid claims against the estate and all mortgages, liens or security interests. Fla. Stat. §§732.206; 732.207.

Effect of Proposed Changes

Creates s. 732.2035, F.S., and provides that except for the exclusions and overlapping applications set forth in s. 732.2045, F.S., (which is a newly created section discussed below in Section 4) the elective estate should consist of the following property interests:

1. The decedent's probate estate.
2. The decedent's ownership interest in securities or accounts registered in "Pay On Death", "Transfer On Death", "In Trust For" or co-ownership with right of survivorship form.²¹

²⁰ The decedent's grandparents and any descendants of the decedent's grandparents (who are not descendants of the surviving spouse) are ineligible family trustees.

²¹ TOD means "transfer on death"; POD means "payment on death"; and ITF means "in trust for." Telephone conversation with Laird Lile, Esq. and Pete Dunbar, Esq., in Tallahassee, Fl. (January 27, 1999). Acronyms should not be used in a bill.

3. The decedent's fractional interest in property held in joint tenancy with the right of survivorship or in tenancy by the entirety, with certain exceptions.
4. Property transferred by the decedent, if at the time of the decedent's death the transfer was revocable by the decedent alone or in conjunction with any other person.
5. With exceptions, that portion of property, transferred by the decedent, if at the time of the decedent's death:

- The decedent possessed the right to, or in fact enjoyed the possession or use of, the income or principal of the property; or
- The principal of the property could, in the discretion of any person other than the spouse of the decedent, be distributed or appointed to or for the benefit of the decedent. In the application of this subsection, a right to payments from an annuity or under a similar contractual arrangement shall be treated as a right to that portion of the income of the property necessary to equal the annuity or other contractual payment.

However, this provision is inapplicable if the decedent's only interests in the property are that:

- The property could be distributed to or for the benefit of the decedent only with the consent of all persons having an interest in the property;
 - The income or principal of the property could be distributed only through the exercise or in default of an exercise of a general power of appointment;
 - The income or principal of the property is or could be distributed in satisfaction of the decedent's obligation of support; or
 - The decedent had a contingent right to receive principal which contingency was beyond the control of the decedent and which had not in fact occurred at the decedent's death.
6. The decedent's beneficial interest in the surrender value immediately before death of any policy of insurance on the decedent's life.
 7. The value of amounts payable under any public or private pension, retirement, or deferred compensation plan, or any similar arrangement, other than benefits payable under the federal Railroad Retirement Act or the federal Social Security System. In the case of a defined contribution plan as defined in s. 414(i) of the IRS Code of 1986, as amended, the elective estate will not apply to the excess of the proceeds of any insurance policy on the decedent's life.
 8. Certain property that was transferred during the 1-year period preceding the decedent's death.
 9. Property transferred in satisfaction of the elective share.

Section 4. Exclusions and overlapping application

Current Law

The elective share is in addition to exempt property. Fla. Stat. §732.20. Exempt property consists of: homestead, household furniture, furnishings, appliances up to \$10,000, automobiles in the decedent's name, Florida Prepaid College Program and family allowances. Fla. Stat. §732.401-03. The current law does not address exclusions and/or overlapping applications.

Effect of Proposed Changes

Creates s. 732.2045, F.S., which provides the following exclusions from the elective share estate:

1. Any transfer of property by the decedent to the extent the transfer is irrevocable before the effective date of this subsection, after the effective date of this subsection and before the date of the decedent's marriage to the surviving spouse.
2. Any transfer of property by the decedent to the extent the decedent received adequate consideration in money or money's worth²² for the transfer.
3. Any transfer of property made by the decedent with written consent of the decedent's spouse (spousal consent to split-gift treatment under the U.S. gift tax laws does not constitute written consent to the transfer by the decedent).
4. The proceeds of any policy of insurance on the decedent's life in excess of the net cash value of the policy.
5. Any policy of insurance on the decedent's life maintained pursuant to a court order.
6. The decedent's one-half of the property to which ss. 732.216-732.228, F.S., apply and real property that is part of the community property.
7. On the date of the decedent's death, any property held in a qualifying special needs trust.

If a property interest included in the "elective estate" is also included in the elective estate as a result of its being a part of the decedent's probate estate, then the estate is reduced by the amount included in the estate as a result of its being in the probate estate. In all other cases, if the same property interest applies to more than one property then only the subsection resulting in the largest elective estate will apply.

Section 5. Valuation of the elective estate

Current Law

Section 732.205, F.S., provides that no elective share is allowed if the decedent was not domiciled in Florida on the date of his death. Section 732.207, F.S., provides that the value of the decedent's property subject to administration is to be the "fair market value".

Effect of Proposed Changes

Substantial rewording of s. 732.205, F.S, removes the requirement that the decedent is to be domiciled in Florida in order to exercise elective share rights.

²² The phrase "in money or money's worth" is referenced in the Internal Revenue Code §2512, Valuation of Gifts, which states: "(b) Where property is transferred for less than an adequate and full consideration *in money or money's worth*, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of the gifts made during the calendar year." IRC, 26 USCS §2512 (1998) (emphasis supplied). See also 26 USCS §§2031 & 2053.

Additionally, this section defines the “value” of properties in the elective estate, including: insurance policies, retirement plans, and property transferred during one year preceding the decedent’s death. All property not specifically mentioned is valued at its fair market value.

Section 6. Elective share amount

Current Law

Section 732.206, F.S., simply provides that the elective share is to be computed by taking into account all of the property of the decedent wherever located that is subject to administration, except real property not located in Florida. Section 732.207, F.S., provides that the elective share is to consist of thirty percent of the fair market value of all of the decedent's property subject to administration, except real property not located in Florida, less: all valid claims, mortgages, liens or security interests on the assets.

Effect of Proposed Changes

Section 732.206, F.S., is “substantially reworded” and does not address what current s. 732.206, F.S., addresses, i.e., property entering into the elective share computation. Instead, it provides that the value of the elective share is the amount equal to the elective share schedule, or, an amount equal to the “minimum elective share,” whichever is greater. The elective share schedule provides:

If the decedent and the spouse were married:

- less than 5 years, then the elective share is 10 percent.
- 5 years, but less than 15 years, the elective share is 20 percent.
- 15 years, but less than 25 years, the elective share is 30 percent.
- 25 years or more, then the elective share is 30 percent.

The “minimum elective share” provides that the value of the elective share is the lesser of \$50,000 or one-half of the elective estate.²³

What is addressed in the existing s. 732.206, F.S., is addressed in s. 732.2035, F.S., of this bill.

Section 7. Sources from which elective share payable

Current Law

Section 732.207, F.S., currently provides for the thirty percent elective share. Section 732.209, F.S., provides that the elective share is to be paid from the assets passing under the will where, but for the election, the assets would have passed outright to the surviving spouse. To the extent that these assets are inadequate to pay for the elective share, then the share is to be paid from property as prescribed in s. 733.805, F.S.; i.e., from assets not disposed of under the will; property devised to the residuary devisee; property not specifically devised; and property specifically devised.

Effect of Proposed Changes

Section 732.207, F.S., is “substantially reworded” and eliminates the thirty percent elective share provision and addresses the substance of s. 732.209, F.S. Section 732.207, F.S., provides that unless otherwise provided in the decedent’s will or, if not in the will, then in a trust referred to in the will, the following are applied first to satisfy the elective share:

1. Proceeds to the benefit of the surviving spouse of any policy of insurance on the decedent’s life, if the policy was owned by someone other than the surviving spouse at the time of the decedent’s death;

²³ *Proposed Changes, supra.* at 95.

2. Amounts to the benefit of the surviving spouse payable under any pension, retirement or compensation plan;
3. One-half of any property described in the exclusions and overlapping applications (s. 732.2045, F.S., herein) paid to or for the benefit of the surviving spouse;
4. Property held in a qualifying special needs trust for the benefit of a surviving spouse;
5. Property interests included in the estate that pass or should have passed to or for the benefit of the spouse; then
6. Property interests that would have satisfied the elective share interests, but were disclaimed.

If the above-listed assets are inadequate to satisfy the elective share, the remaining amount is to be apportioned among the direct recipients of the remaining elective estate as follows:

- The decedent's probate estate;
- Recipients of specified property interests included in the elective estate; and
- Recipients of all other property interests included in the elective estate, except: charitable deductions.

Contributions required of the probate estate and a revocable trust are to be made in cash or kind. Any amount used to satisfy the elective share from the decedent's probate estate are to be paid from the assets as prescribed in s. 733.805, F.S. Any amount of the elective share to be satisfied from trust property is to be paid from the assets of the trust, unless otherwise provided in the trust instrument or in the decedent's will.

Section 8. Liability of direct recipients and beneficiaries

Current Law

Section 732.208, F.S., provides that the elective share is in addition to certain other properties and allowances. Section 732.402, F.S., provides: "[e]xempt property shall be in addition to any property passing to the surviving spouse or heirs of the decedent under s. 4, Art. X of the State Constitution or the ... elective share...."

Effect of Proposed Changes

Section 732.208, F.S., is "substantially worded" and deletes the statement that the elective share shall be in addition to certain other properties and allowances. Nevertheless, the existing s. 732.402, F.S., and the new s. 732.210, F.S., (see Section 10 below in this analysis) continue to provide that the elective share is in addition to certain properties.

Section 732.208, F.S., provides protection to recipients who share in the estate. In those rare cases where the probate estate and revocable trust are insufficient to satisfy the full elective share, the remaining assets are satisfied from other recipients in the estate whose share declines in value.²⁴ Section 732.208, F.S., provides the following protections to bona fide purchasers and other third parties:

1. Only direct recipients of property who are included in the elective estate, beneficiaries of the decedent's probate estate, or beneficiaries of any trust are liable to contribute toward satisfaction of the elective share. Each direct recipient, as specified, is liable in the amount equal to the proportional part of the liability for all members of his or her class, as otherwise described. Trust and probate estate beneficiaries who receive a distribution after the decedent's death are liable for the amount equal to the value of the principal multiplied by

²⁴ *Proposed Changes, supra.* at 95.

the contribution percentage of the distributing trust. "Contribution percentage" and "remaining unsatisfied balance" are defined.

2. Instead of paying the amount for which they are liable, beneficiaries who have received a distribution of property included in the elective estate and direct recipients, other than the decedent's probate estate or revocable trusts, may:
 - contribute a proportional part of all the property received; or
 - with respect to any property interest received before the date of the court's order of contribution,
 - contribute all of the property; or
 - if the property has been sold or exchanged prior to the date on which the spouse's election is filed, pay an amount equal to the value of the property, less reasonable costs of sale, on the date it was sold or exchanged.
3. With respect to 2. immediately above, if a person pays the value of the property, or contributes all of the property received, then no further contribution toward satisfaction is required. Any unsatisfied contribution is reapportioned to the other recipients, as provided.
4. If federal law preempts ss. 732.2035 (property entering into elective estate) and 732.207, F.S., (sources from which elective share is payable) with respect to payment, an item of property, or any other benefit included in the elective estate (collectively referred to as "payment"), a person who receives the payment is obligated to return the payment or is personally liable for such amount.²⁵ Federal law currently preempts with regard to who receives the benefit of certain securities such that those securities would not be allowed to be a part of the elective estate.

In *Matter of Scheiner*, 535 N.Y.S. 2d 920 (Sup. Ct. 1988), a surviving spouse claimed her right to elect against the decedent's U.S. Treasury bills which were purchased in joint names of the decedent and his sister, prior to his marriage. New York state law specifically omits U.S. Savings Bonds from a surviving spouse's elective share. EPTL 5-1.1(b). However, it does not omit U.S. Treasury bills purchased with right of survivorship. Accordingly, under the New York law, the surviving spouse was entitled to elect against the U.S. Treasury bills to satisfy his elective share. Nonetheless, the court denied the surviving spouse's claim and held that U.S. Treasury bills cannot be considered testamentary substitutes against which a surviving spouse can elect her share because

- 1) the inter vivos transaction occurred prior to the marriage, in violation of New York state law, EPTL 5-1.1(b)(1), and
- 2) state law must comport with federal law.

²⁵ This provision is identical to Section 2-210 of the Uniform Probate Code, as amended, which states: "(b) If any section or part of any section of this Part is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent' nonprobate transfers to others, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of that item of property or benefit, as provided in Section 2-209, to the person who would have been entitled to it were that section or part of that section not preempted."

The relevant federal law can be found in 31 CFR part 357 which establishes the Treasury Direct. The Treasury Direct allows securities which are held in the names of two people with right of survivorship to pass free from a surviving spouse's right of elective share. 31 CFR pt. 357, Appendix A. This provision allows a spouse to create conclusive ownership in a security interest and overrides any inconsistent state law. 31 CFR pt. 357. Accordingly, pursuant to federal law requirements, the court in *Scheiner* disallowed the surviving spouse's election against the decedent's U.S. Treasury bills.

In its opinion, the *Scheiner* court relied upon *Free v. Bland*, 369 U.S. 663 (1962), where the surviving spouse asserted his elective share against bonds issued to "Mr. or Mrs." Free. The Supreme Court stated that "the relative importance to the State of its *own* law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Id.* at 666 (emphasis added). This principal was made clear by Chief Justice Marshall when he stated that "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Id. citing Gibbons v. Ogden*, 9 WHEAT 1, 210, 211. In *Free*, the Supreme Court held that the supremacy clause of the Federal Constitution invalidated Texas state law where property purchased with community property retained its community nature.

Pursuant to the *Free* decision, the *Scheiner* court agreed that state law must comport with federal law in order to avoid any constitutional concerns. Therefore, the *Scheiner* court held that under New York state law, the term "U.S. Savings Bonds" must be construed to include "U.S. Treasury bills" within its meaning to find this state law consistent with the federal law.

Although, *Scheiner* only applied the Treasury Direct to U.S. Savings Bonds and U.S. Treasury bills with right of survivorship, this federal regulation may apply to several other types of securities held in the Treasury Direct. The Treasury Direct defines the right of survivorship as "a security [which] is registered in beneficiary form or a form which provides for a right of survivorship, upon the death of an owner, notwithstanding any purported testamentary disposition by the decedent and notwithstanding any State or other law to the contrary...." 31 CFR 357.22(c). This provision, if construed broadly, would include any security registered in beneficiary form. A security held in beneficiary form permits the owner to have sole control during his or her lifetime, but in the event of his or her death passes by right of survivorship to the beneficiary. 31 CFR pt. 357, Appendix A.

In addition, and as seen in *Free*, federal regulation 31 CFR 357.21(b)(2) also provides that a security held in the names of two individuals, joined by the word "or", *without* right of survivorship, still confers a conclusive right of survivorship. Therefore, this type of registration may fall under the Treasury Direct's provisions which allow the security to pass free from the spouses right of election.²⁶

Section 9. Valuation of property used to satisfy elective share

Current Law

Section 732.209, F.S., specifies from what assets the elective share is payable.

Section 732.207, F.S., provides that the property used to satisfy the elective share is to be valued at "fair market value" on the date of the decedent's death.

Effect of Proposed Changes

As in previous sections, the directory language provides that s. 732.209, F.S., is "substantially reworded;" however, the new language has nothing to do with the subject matter of the old s. 732.209, F.S. Nonetheless, there is no option with regard to the directory language inasmuch as the same section number is used.

²⁶ Treasury Direct expressly provides that its regulations preempt applicable state law. 31 CFR 357.10(a)(7).

Section 732.209(1), F.S., in this bill defines: “applicable valuation date”, i.e., for a special needs trust, the applicable valuation date is the date of the decedent’s death; “qualifying power of appointment”; and “qualifying invasion power.” In addition, s. 732.209(2), F.S., provides that, except as otherwise provided, the value of property is to be fair market value.

If the surviving spouse has a life estate in property, not in trust, then the value of his or her interest is one-half of the value of the property on the valuation date.

If the surviving spouse holds an interest in a trust that meets the requirements of an elective share trust, then, the value of the interest is a percentage, as listed below, of the value of the principal in trust on the valuation date:

1. One-hundred percent if the trust instrument includes both a qualifying invasion power and a qualifying power of appointment;
2. Eighty percent if the trust instrument includes a qualifying invasion power but no qualifying power of appointment; or
3. Fifty percent in all other cases.

If the surviving spouse is a beneficiary of a trust that meets the requirements of a qualifying special needs trust, then the value of the trust is the value of the principal of the trust, or trust portion, on the applicable valuation date.

If the surviving spouse has an interest in a trust that fails to meet the requirements of an elective share trust, then the value of the spouse’s interest is the transfer tax value of the interest on the applicable valuation date, provided that the aggregate value of all the spouse’s interests in the trust does not exceed one-half of the trust principal.

The valuation of any policy of insurance on the decedent’s life is the net proceeds. The value of the right to payments from an annuity or other plan is the transfer tax value of the right on the applicable valuation date.

Section 10. Effect of election on other interests

Current Law

Section 732.210, F.S., provides the right of election to the surviving spouse or guardian of the property of the surviving spouse. Section 732.208, F.S., provides that the elective share is in addition to exempt property and allowances, as provided in ch. 732, part IV, F.S., which includes: homestead, household furniture, furnishings, appliances up to \$10,000, automobiles in the decedent's name, Florida Prepaid College Program and family allowances. Furthermore, s. 732.211, F.S., provides that after payment of the elective share, the remaining assets are to be distributed as though the surviving spouse predeceased the decedent.

Effect of Proposed Changes

Section 732.210, F.S., is “substantially reworded.” It does not address who has the right to an elective share (s. 732.212, F.S., does and that section is discussed below in Section 12); instead, it further defines the effects of election on other interests. Section 732.210(1), F.S., provides that the elective share is in addition to homestead, exempt property and allowances. It also provides, as does existing law under s. 732.211, F.S., that if an election is filed, the balance of the estate is administered as though the surviving spouse had predeceased the decedent.

Section 11. Protection of payors and other third parties

Current Law

Section 732.211, F.S., provides that if an election is filed, the balance of the estate is administered as though the surviving spouse had predeceased the decedent. Currently, the elective share statute does not address protection of third parties.

Effect of Proposed Changes

Section 732.211, F.S., is “substantially reworded” and does not address the effect of the exercise of the right of election on testamentary or statutory disposition as does the existing s. 732.211, F.S. That subject matter is addressed in s. 732.210, F.S., of this bill as discussed above in Section 10. Section 732.211, F.S., provides instead that even though a property interest is included in the decedent’s estate, a payor or other third party is not liable for paying, distributing or transferring the property to a beneficiary.

Section 12. Right of Election; by whom exercisable

Current Law

Section 732.212, F.S., addresses the time parameter within which a surviving spouse must file for an elective share. Section 732.210, F.S., provides that the right of election is exercisable by the surviving spouse and by a guardian of the property of the surviving spouse.

Effect of Proposed Changes

Section 732.212, F.S., is “substantially reworded” and does not address the time parameter within which election must be made, as does the current s. 732.212, F.S. Section 732.213, F.S., of the bill does, however, address that subject and is discussed in Section 13 below.

Section 732.212, F.S., instead (like current s.732.210, F.S.), provides that the elective share right may be exercised by the surviving spouse or guardian of the property of the surviving spouse. **However, s. 732.212, F.S., also creates the right for an attorney in fact to exercise the right of election.**

Section 13. Time of election; extension; withdrawal

Current Law

Section 732.213, F.S., addresses the right to dower. Section 732.212, F.S., provides that an election is to be filed within four months from the date of the first publication of notice of administration. However, if a proceeding occurs involving the construction, admission to probate or validity of the will, the surviving spouse has forty days from the date of termination of the proceedings to file the election.

Effect of Proposed Changes

Section 732.213, F.S., is “substantially reworded” and deletes the provisions regarding the pre-existing rights to dower as are currently set forth in s. 732.213, F.S., and amends the time of election.

Section 732.213, F.S., creates a statute of limitations and provides that the election is to be filed within the earlier of 6 months of the date of the first publication of notice of administration or 2 years after the date of the decedent’s death. Within this period, the attorney in fact or guardian of the property may petition the court for an extension of time for making an election.

The election may be withdrawn within eight months of the decedent’s death prior to the court’s order of contribution by the surviving spouse, attorney in fact, guardian of the property or the personal representative. If the election is withdrawn, the court may assess fees and costs against the surviving spouse’s estate. A petition for extension of time to make the election will toll the statute of limitations.

Concerns arise as to whether increasing the time within which to make an election will allow for the greater distribution of property which may later need to be “reacquired” in order to satisfy the elective

share. Additionally, current law does not allow for tolling of the time for an election pursuant to a petition for time extension; tolling only effectively occurs pursuant to certain litigation.

Section 14. Order of contribution; personal representative's duty to collect contribution

Current Law

Section 732.214, F.S., provides that upon a petition of the personal representative or the surviving spouse, the court is to determine the amount of the elective share and order its payment in cash or kind. No distribution is required until 6 months from the date of death, when no federal estate tax is required to be filed, or until the tax return is timely filed, when required. Assets distributed in kind are to be distributed at fair market value on the date of the distribution.

Effect of Proposed Changes

Section 732.214, F.S., is "substantially reworded" and provides that the court must determine the amount of the elective share and order contribution.

In addition, s. 732.214, F.S., provides that all contributions bear interest at the statutory rate beginning 90 days from the date of the order. Furthermore, the personal representative must collect contributions from the recipients of the elective share. If property held by the personal representative is to be distributed to a beneficiary who is required to contribute in satisfaction of the elective share, then the personal representative is to withhold from distribution the amount required to be contributed by the beneficiary; no such similar provision exists in current law. The personal representative is not required to seek collection of any portion of the elective share from property outside his or her control until after the court enters an order of contribution.

If after the order of contribution, the personal representative brings an action to collect contribution, **the judgment must include the personal representative's costs and reasonable attorney's fees.**

Section 732.214, F.S., provides that a personal representative who has the duty of enforcing contribution, may be excused from that duty if the court finds that it is impracticable to enforce contribution. The personal representative will not be held liable for failure to attempt collection *if* the attempt would have been economically impracticable. The implication is that the personal representative will be held liable if attempts were not made to collect if economically practicable to do so. Although this provision does not create a clear cause of action, existing law regarding fiduciary responsibilities is available.

Section 732.214(4), F.S., further provides the independent right of the surviving spouse to collect the elective share, and if the spouse brings an action to enforce the elective share, then **the judgment is to include the spouse's costs and reasonable attorney's fees.**

Section 15. Effective date; effect of prior waivers; transition rules

Current Law

Section 732.215, F.S., provides that if an elective share election increases any estate, inheritance, or other death tax, the share of the surviving spouse shall bear the additional tax.

Effect of Proposed Changes

Section 732.215, F.S., is "substantially reworded" and does not address the tax provision; in fact, this tax provision was completely eliminated from the bill. *Accordingly, if an elective share election increases any estate, inheritance or other death tax, the surviving spouse's share would not bear the additional tax.*

Section 732.215, F.S., provides that its provisions are effective on October 1, 1999, for all decedents dying on or after October 1, 2000. The law prior to October 1, 1999, applies to decedents dying before October 1, 2000.

This delay in applying the law is to allow a transition period for learning what the new law requires.

In addition, this section provides that a waiver of elective share rights “which is otherwise” in compliance with s. 732.702, F.S., is a waiver of all rights under ss. 732.201 through 732.214, F.S. Any trust created prior to the effective date that meets the requirements of an elective share trust is treated as though the trust was created after the effective date and in satisfaction of the elective share.

Lastly, this section provides that nothing in ss. 732.201 - 732.215, F.S., applies to the rights of spouses under ch. 61, F.S. (Dissolution of Marriage; Support; Custody.)

Section 16. Provides an effective date of October 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None

2. Recurring Effects:

See “Fiscal Comments” section herein.

3. Long Run Effects Other Than Normal Growth:

None

4. Total Revenues and Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None

2. Recurring Effects:

See “Fiscal Comments” section herein.

3. Long Run Effects Other Than Normal Growth:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None

2. Direct Private Sector Benefits:

None

3. Effects on Competition, Private Enterprise and Employment Markets:

None

D. FISCAL COMMENTS:

This bill expands the assets available in the decedent's estate upon which a surviving spouse may exercise his or her elective share rights. This may increase the use of the elective share option which requires involvement by the court thereby possibly increasing judicial workload. Both the state and counties incur expenses in support of the judicial branch.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Concerns regarding HB 301

Critics raise several concerns regarding CS/HB 301. First, they assert that this bill should correspond to the current law applied in divorce proceedings. Pursuant to s. 61.075, F.S., the courts begin, in a divorce proceeding, with the premise that distribution of marital assets should be equal. If the distribution cannot be equal, then the courts consider other relevant factors such as: economic contribution by the parties and duration of marriage. If this bill passes as is, and a spouse dies, then the surviving spouse will receive significantly less than if they divorce. (This is, however, also an applicable criticism to current law.) Critics suggest that this will promote poor public policy.²⁷

Second, critics argue that this bill should include 50 percent of the marital assets as an option for an elective share.²⁸ This option would be in addition to the elective share schedule and the minimum elective share options.

Third, critics contend that this bill is too complicated and long, and may now require attorneys to value assets in the estate which has the potential to drive up attorney's fees and costs. This may create litigation regarding the valuation of assets between parties and may create a cause of action for liability against the attorney as to whether the asset was valued reasonably.²⁹

Judiciary Committee Staff Comments:

Overview of Florida Law on Dower, Devise of Property, and their relationship

²⁷ Telephone conversation with Deborah Marks, Family Law Section of the Florida Bar, in Tallahassee, FL. (January 27, 1999)(giving the following example: if a couple divorces, the spouses are entitled to 50 percent of the entire marital estate under s. 61.075, F.S., however, if a spouse dies after 20 years of marriage, under this bill, the surviving spouse is only entitled to 30% of the probate estate which does not include nonprobable assets.)

²⁸ *Id.*

²⁹ *Id.*

The law of dower comes to Florida through the common law of England, where it was apparently introduced by the Normans or the Danes.³⁰ Whatever the reason for establishment of dower in England, the practical reason for its existence was to provide for the sustenance of the widow and the rearing and education of the minor children.³¹ But under common law in England, a widow was not entitled to dower in the lands to which her husband held only an equity or beneficial interest, or in trust property, the legal title of which was held in trust for the husband.³²

The right of a widow to dower in Florida was recognized by the Legislative Council of Florida as early as 1828, and it applied to real estate of which the husband was seized and possessed of legal title at the time of his death. The dower law as to personal property provided that a husband could dispose of his personal property during marriage and thus defeat his wife's dower interest, even if his sole motive was to defeat dower. Smith v. Hines, 10 Fla 258, 285 - 286 (1863). The Probate Act of 1933 eliminated the necessity of actual seizin of legal title and confirmed that the widow's right to dower vested in all property "owned" by the husband, by any title, legal or equitable, at the time of his death. Dower consisted of: one third part in fee simple of the real property which was owned by her husband at the time of his death, and one third part absolutely of the personal property owned by her husband at the time of his death. In re Griffin's Estate, 164 So.2d 883 (Fla 1DCA 1964). The husband's right to dispose of personal property to defeat dower continued. Whidden v. Johnson, 54 So2d 40 (Fla. 1951).

The 1968 revision to the Florida Constitution continued to provide in Article X Section 5 that dower or curtesy may be established and regulated by law. The right to any dower estate in real or personal property was extinguished for the surviving spouse of decedents whose death occurred after January 1, 1976, when Florida's current Probate Code became effective. The new code, in abolishing dower and curtesy, provided the current elective share.

A second and separate right -- the right to acquire, possess and protect property -- understood to include the right to devise the property Shriners Hospitals for Crippled Children v. Zrillic, 563 So.2d 64 (Fla. 1990) has also been interwoven into the fabric of Florida history.³³ It is currently included in Article I, Section 2 of the 1968 Constitution as a basic right:

All natural persons are equal before the law and have inalienable rights, among which are the right . . . to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law.

³⁰ Blackstone, vol 2, page 129

³¹ Redfern, Sec 19-1, page 327.

³² Dixon v. Saville (1783), 1 Bro. C.C. 326.

³³ *See Article I, Section 1, Florida Constitution (1838); Article I, Section 1, Florida Constitution (1861); Declaration of Rights, Sections 1 and 17, Florida Constitution (1868), Declaration of Rights, Sections 1 and 18, Florida Constitution (1885).

In the past, when the right of dower has been confronted by the right to devise property in the form of a trust or conveyance, the right to devise -- absent some sort of fraud -- has prevailed over the right of dower. Smith v. Hines, supra; Whidden v. Johnson, supra. Indeed, when the legislature revised the Probate Code in 1974, it rejected Section 2 - 202 of the Uniform Probate Code which provided that surviving spouses could not be deprived of a "fair share" of an estate through the use of a will substitute. Estate of Solnik, 401 So.2d 896, 897 (Fla. 4 DCA 1981).

Recent cases have continued to reveal inequities in elective shares to surviving spouses. This proposed legislation is an attempt to address the "constitutional right to be a mean-spirited, no good curmudgeon" who develops an estate plan which entirely cuts out the spouse. Friedberg v. SUNBANK/Miami, N.A., 648 So.2d 204 (Fla 3 DCA 1994).

The law in this state has permitted transfers during life to cut-off the rights of a surviving spouse since Florida was admitted to the Union in 1838. Inequities have been periodically brought to the attention of law makers since no later than 1863. And in the revision of the Probate Code in the mid 1980's lawmakers consciously considered this inequity and preserved it by not adopting Section 2 -202 of the Uniform Probate Code as it existed at that time. Presumably there were valid reasons to permit these transfers.

Legitimate Need for Inter vivos Trusts Exists

- When both spouses bring wealth into a second marriage, they may both want "their property" to go to the children and descendants of a prior marriage. This common and reasonable goal is currently achieved through the use of a revocable inter vivos trust.
- Funds may have previously been transferred into an inter vivos trust pursuant to a divorce agreement of a previous marriage where the trust cared for children of the marriage for needs other than health, safety, maintenance and education of the children.
- An individual may set aside funds to care for an infirm parent who may not be expected to survive the grantor, where the grantor desires any unexpended funds to be available for the grantor's use during the grantor's life, but is uncertain as to whether any excess fund will exist.
- Similarly, funds may have been placed in an inter vivos trust to care for a mentally or physically impaired child who may or may outlive the grantor.
- During the entire existence of estate planning in Florida, families have been able to rely upon the linear transfer of inherited wealth by conveyance by trust. These transfers have been made as irrevocable, multi-generational trusts or as inter vivos trusts. The bill, as proposed, would include at least some portion of some of these trusts in computing the elective estate.

Some of the items proposed to be included in the elective estate may also constitute a "windfall" to the surviving spouse:

- Valid reasons for joint tenancies exist: they may be the result of a successful business relationship which came to fruition long before the current marriage.
- Retirement plans are valued and included in the elective estate. The entire retirement plan may have been earned before the current marriage. In addition, a portion of the plan may already be assigned to a previous spouse through a settlement agreement.

The Legislation may fail to cure existing inequities and may also create new inequities

Despite all these proposed reforms, a surviving spouse may still receive only a small portion of a large estate: a life estate in the income of a trust which consists of one-half of the elective estate may not produce much income for an elderly spouse; especially if the assets are not currently income producing and if considerable time would be required to sell the assets.

Other difficulties are raised by the “schedule” which increases the elective estate as a function of the longevity of the marriage. While it is true that in divorce proceedings the court starts from the premise of an equal distribution, there is no specific formula for apportionment. The court is free to consider a number of factors in reaching an equitable distribution. The proposed elective estate statute does not give the judge similar latitude in determining an elective share, and inequities may result:

- Marriage to an extremely wealthy individual for only a few months may result in a multi-million dollar elective estate; the result could well be different under Chapter 61.

The Proposed Legislation may be overbroad and unconstitutional

Florida’s constitutional right to devise property may also be an impediment. In striking down Florida’s mortmain statute, the Florida Supreme Court found the law to be over inclusive, as voiding intentional bequests by testators who do not have immediate family members in need of protection.³⁴ Moreover, the court found the legislation to defeat the testator’ express intent without any reasonable relationship to the evil sought to be cured. The proposed bill, in not taking into account the independent wealth of the surviving spouse may also fail for over inclusiveness.

More time may be needed to study the effects of legislation

Although the Florida Probate Code was enacted as Chapter 74-106, its effective date was postponed until July 1975 so that there could be an additional year’s study of the act. Additional legislation was enacted in 1975, and the effective date of the entire Probate Code was further extended to January 1, 1976. This bill may benefit from a similar expansion of time until its effective date.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES

On February 3, 1999, the Committee on Real Property and Probate passed a “remove everything after the enacting clause amendment.” This remove everything amendment provides various technical changes and the following substantive changes to HB 301:

- defines “qualifying special needs trust”;
- excludes the “qualifying special needs trust” from the probate estate;
- continues to provide the order in which property is to be used to satisfy the elective share, however, CS/HB 301 includes in that order: one-half of any property described in the exclusions and “qualifying special needs trust”;
- defines the applicable valuation date of a “qualifying special needs trust” as the date of the decedent’s death;
- defines the valuation of the “qualifying special needs trust” as the value of the principal of the trust, or trust portion, on the valuation date;

³⁴ Shriners Hospital, supra.

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- amends the effective date to October 1, 1999, for all decedents dying on or after October 1, 2000, and, states that the law prior to October 1, 1999, applies to decedents dying before October 1, 2000; and
- states that nothing in this bill applies to ch. 61, F.S., dissolution of marriage.

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY AND PROBATE:

Prepared by:

Staff Director:

Christine Hoke, J.D.

J. Marleen Ahearn, Ph.D., J.D.

AS REVISED BY THE COMMITTEE ON JUDICIARY:

Prepared by:

Staff Director:

Jo Ann Levin

Don Rubottom