

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1749      Probate and Trusts  
**SPONSOR(S):** Committee on Judiciary  
**TIED BILLS:**                      **IDEN./SIM. BILLS:**

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	15 Y, 0 N	Havlicak	Havlicak
2) Appropriations		Davis	Hansen
3)			
4)			
5)			

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### SUMMARY ANALYSIS

This bill continues Florida's comprehensive revision of its probate and trust law. Some of the more significant provisions of this bill include:

- Adding evidence of exposure to a "specific peril" as a basis for presuming death, with particular venue provisions for petitioning a court for such a determination.
- Establishing a specific conflict of interest standard, i.e., when each of the trustees are also personal representatives of the estate, then the beneficiaries of the trust are the estate beneficiaries. Otherwise, it is the trustees of the trust who are the beneficiaries of the estate.
- Eliminating a conflict in the law by removing the exception of homestead property from the application of the Florida Uniform Disposition of Community Property Rights at Death Act.
- Addressing gaps in the antilapse laws concerning beneficiaries deemed to have predeceased a decedent by operation of law.
- Incorporating federal law by expressly providing that military testamentary instruments properly executed by an individual eligible for military legal assistance pursuant to Title 10 U.S.C. § 1044d are valid wills in this state.
- Amending provisions relating to the serving of the notice of administration and notice to creditors.
- Providing that civil actions based upon constructive fraud must be initiated within four years of when the facts giving rise to the action are discovered, or should have been discovered with the exercise of due diligence.
- Clarifying personal representative's powers pertaining to control and expenditure of funds for protected homestead property.

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

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h1749a.ap.doc  
**DATE:** April 18, 2003

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

In 2001, the Legislature enacted an extensive rewrite of Florida’s Probate Code.<sup>1</sup> This bill is a continuation of the comprehensive revision. Many of the provisions in this bill amend Florida’s trust statutes to make them consistent with the earlier changes in the Probate Code.

**SECTION 1:** In some probate cases, the ability of a court to determine whether one is deceased becomes an issue. Section 731.103, F.S., sets forth guidelines by which a court may determine issues of death and status of an individual. Subsection (3) creates a presumption of death if a person has been absent from his or her last known domicile for 5 continuous years and, after a diligent search and inquiry, the absence is not satisfactorily explained. In these cases, the law provides that the person’s death is presumed to have occurred at the end of the five year period unless evidence exists indicating the death occurred earlier.

**PROPOSED CHANGES:** This bill amends Florida’s presumption of death in probate proceedings provision found in s. 731.103, F.S. The change adds a “specific peril” grounds to the presumption of death. This is designed to make it easier for a court to find that death has occurred in a major disaster situation without having to wait the five year period currently required by the statute.<sup>2</sup> The bill also includes special venue rules permitting a petition for a determination of death to be filed in the county where the decedent maintained his or her domicile or, in the case of a nonresident, in any county of the state.

**SECTIONS 2 and 3:** Section 731.201, F.S., is the definitional section of the Florida Probate Code. Subsection 2 defines “beneficiary” of the estate to include a trustee in the case of a devise to an existing trust or trustee, or to a trust or trustee described in the will as long as there is no conflict of interest of the trust. It further provides that an owner of a beneficial interest in a trust is a beneficiary of the trust and not a beneficiary of an estate unless there is a conflict of interest. A conflict of interest is not defined in the probate code. Subsection 9 defines “devisee” to mean a person designated by a will to receive a devise. Where there is a devise to a trust or trustee, the trust or trustee is the devisee; the beneficiaries of the trust are not devisees.

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<sup>1</sup> The Florida Probate Code consists of Chapters 731 through 735 of the Florida Statutes. See s. 731.005, F.S. The rewrite can be found in ch. 2001-226, L.O.F.

<sup>2</sup> The “specific peril” provision in this bill is patterned after a law enacted by New York following the tragic events of September 11, 2001. See N.Y. EST. POWERS & TRUSTS § 2-1.7.

**PROPOSED CHANGES:** This bill clarifies when a trustee of a trust in a pour-over or testamentary trust arrangement<sup>3</sup> is the beneficiary of the estate or whether the beneficiaries of the trust are the beneficiaries of the estate. The changes in these sections set the following standard: when each of the trustees are also personal representatives of the estate, then the beneficiaries of the trust are the estate beneficiaries. Otherwise, it is the trustees of the trust who are the beneficiaries of the estate.

Specifically, this bill eliminates the old standard of "conflict of interest" in s. 731.201(2), F.S., and replaces it with the standard discussed above in the definition of "beneficiary". The bill also:

- adds the new standard to the "devisee" definition found in s. 731.201(9), F.S.;
- amends the definition of "interested person" found in s. 731.201(21), F.S., by adding a reference to claims against the estate in the context of when the trustee of a trustee described in s. 733.707(3), F.S., is an interested person in the administration of the grantor's estate;
- amends s. 731.303(1)(b)2., F.S., to explicitly define a conflict of interest when each trustee of a trust (which is a beneficiary of the estate) is also a personal representative of the estate; and
- adds the new conflict of interest standard to s. 733.212(1), F.S., which identifies who is to be served with a Notice of Administration so that trust beneficiaries are served when they are by definition the beneficiaries of the estate.

**SECTION 4:** While Florida is not a community property state, it has adopted the Uniform Disposition of Community Property Rights at Death Act ("Act").<sup>4</sup> The Act is designed to recognize and protect marital rights in property which originated in a community property jurisdiction or acquired by spouses when domiciled in a community property jurisdiction. However, s. 732.225, F.S., creates an amendment to the Act which attempts to clarify how homestead realty would be handled and community property rights severed which were imported into Florida from a community property jurisdiction. Section 732.217(2) defines the whole Act as not applicable to homestead property.<sup>5</sup> Thus, currently there is a conflict between these two sections: how can the Act clarify how homestead property is handled (s.732.225, F.S.) if the whole Act does not apply to homestead realty (s. 732.217(2), F.S.)?

**PROPOSED CHANGES:** This bill strikes the exception of homestead property from the application of the Florida Uniform Disposition of Community Property Rights at Death Act.

**SECTION 5:** Section 732.502, F.S., sets forth the requirements for executing a will in Florida. Many Floridians and their family members live out-of-state due to military service. These individuals are entitled to military legal assistance and often execute wills during their military service. Similarly, many non-Floridians reside in this state pursuant to military orders. They also have the opportunity to execute a military testamentary document while in Florida. Currently, federal law provides that military testamentary instruments are:

exempt from any requirement of form, formality, or recording before probate that is provided for testamentary instruments under the laws of a State [and such instruments

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<sup>3</sup> A pour-over trust is created by "[a] provision in a will in which the testator leaves the residue of his estate to a trustee of a living trust for purpose of that pour-over trust"; a testamentary trust is "created within a within a will and executed with the formalities required of a will . . . . [and] does not take effect until the death of the settlor." BLACK'S LAW DICTIONARY, 6<sup>th</sup> edition.

<sup>4</sup> See ss. 732.216-732.228, F.S. The U.S. community property jurisdictions are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin, and Puerto Rico.

<sup>5</sup> Homestead property for this purpose "refers only to property the descent and devise of which is restricted by s. 4(c), Art. X of the State Constitution." Section 732.227, F.S.

have] the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate.<sup>6</sup>

**PROPOSED CHANGES:** This bill incorporates existing federal law by expressly providing that military testamentary instruments properly executed by an individual eligible for military legal assistance pursuant to Title 10 U.S.C. § 1044d are valid wills in this state.

**SECTIONS 6 and 17:** When a will devises property to a person, and that person predeceases the testator, then that person cannot receive the property and the gift is said to have “lapsed”. When a devise lapses, the property becomes part of the residuary estate, and the testator’s intent for that devise may be thwarted.

Section 732.603, F.S., provides that a lapsed devise to a grandparent of the testator, or to a lineal descendent of a grandparent of the testator, will not lapse but is to be distributed to lineal descendants unless there is a contrary intent in the will. This antilapse provision also applies to a beneficiary of a testamentary trust.<sup>7</sup>

The antilapse provision found in s. 732.603, F.S., currently does not cover beneficiaries who are deemed to predecease the decedent by operation of law. An example includes when a beneficiary murders the decedent and, under s. 732.802, F.S., is deemed to predecease the decedent by operation of law.<sup>8</sup>

Currently, Florida does not have a similar law that addresses lapses in inter vivos trusts.<sup>9</sup>

**PROPOSED CHANGES:** Section 6 of this bill addresses gaps in the antilapse coverage concerning beneficiaries deemed to have predeceased a decedent by operation of law.

Section 17 of this bill creates s. 737.603, F.S.; which provides that similar antilapse provisions to those found in s. 732.603, F.S., apply to inter vivos trusts.

**SECTION 7:** Section 733.205, F.S., pertaining to notarial wills, provides that a copy of a will may be probated if the original is in the possession of a notary entitled to its custody in a foreign country and the laws of that country require that the will remain in the custody of the notary. The statute requires that the will be duly authenticated by the notary “whose official position, signature, and seal of office are further authenticated by an American consul, vice consul, or other American consular officer within whose jurisdiction the notary is a resident.”

**PROPOSED CHANGES:** Provides for authentication of a foreign notary’s official position, signature and seal of office by means of the Hague Convention of 1961.<sup>10</sup>

**SECTION 8:** Section 733.212(1), F.S., requires the personal representative of a decedent’s estate to prepare a notice of administration and serve it on surviving spouses, beneficiaries, trustees of certain trusts and persons who may be entitled to exempt property.

**PROPOSED CHANGES:** This bill amends s. 733.212(1), F.S., to require the personal representative to serve the notice of administration on trust beneficiaries if each trustee is also a personal representative of the estate. This change is necessary to conform to the changes found in section 3 and 4 of the bill pertaining to conflicts of interest.

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<sup>6</sup> Title 10 U.S.C. § 1044d(a).

<sup>7</sup> A testamentary trust is a trust created by a will and takes effect only upon the testator’s death.

<sup>8</sup> Another example is the Probate Code’s simultaneous death statute found in s. 732.601, F.S.

<sup>9</sup> Inter vivos trusts are created during the lifetime of the settlor and become effective during his or her lifetime.

<sup>10</sup> Convention Abolishing the Requirement of Legalization for Foreign Public Documents, Oct. 5, 1961, U.N.T.S. 189, T.I.A.S. 10072. The United States Senate ratified this convention in 1981.

**SECTION 9:** Section 733.2121, F.S., sets forth the contents of the personal representative's Notice to Creditors which must be published in probate administrations. Prior to the Probate Code revision of 2001, the statutory notice only required a reference to the three month rule as the period for filing of creditors' claims.<sup>11</sup> The code revision in 2001 added the requirement to include in the notice the two year claims rule of s. 733.710, F.S., which states that regardless of any notice, all claims not filed within two years of the decedent's death are null and void.<sup>12</sup>

Proponents of this change have indicated that adding the two year rule in the notice to creditors has had the following undesirable effects: creating confusion as to the wording of the Notice to Creditors; doubts as to the efficacy of many notices which have been published statewide since the 2001 revisions took effect; and changing s. 733.710, F.S., from being a statute of repose (jurisdictional end to creditors' claims) to a statute of limitations (an affirmative defense to claims).

**PROPOSED CHANGES:** This bill eliminates the need for the personal representative of the estate to include in the Notice to Creditors any reference to the two year statute of repose found in s. 733.710, F.S. Only the three month rule set forth in s. 733.702, F.S., will need to be referenced in the notice as limiting the claims period.

**SECTION 10:** Section 733.608, F.S., grants powers to the personal representative of an estate to control and expend estate funds for a protected homestead. Currently, there are no provisions as to how the personal representative is to do this, particularly in expenditure of estate funds in maintaining the homestead property. The personal representative has no lien on the homestead and therefore would be disinclined to expend funds since it is not part of the otherwise administrable probate estate. Additionally, there are no protections for the personal representative when he or she finds that the homestead should not be controlled.

**PROPOSED CHANGES:** This bill adds further details to the Probate Code revision of 2001 which introduced the power of the personal representative to take control of protected homesteads. Specifically, this bill adds the following provisions:

- Subsection (3) establishes the lien of the personal representative if he or she expends funds for the homestead. It also details how the lien is enforced to assure repayment of the funds expended.
- Subsection (4) provides details on how the lien is recorded in the county records so that proper notice is given of its existence.
- Subsection (5) describes how the lien terminates.
- Subsection (6) details how the lien attaches and the manner in which estoppel information about the lien is provided.
- Subsection (7) provides that the lien can be foreclosed like a mortgage.
- Subsection (8) establishes taxable costs and attorney's fees shall be awarded to the prevailing party if legal action is necessary to enforce the debt.
- Subsections (9) & (10) relieve the personal representative from the duty to seek collection of funds expended on the homestead if it is uneconomical or impractical.
- Subsection (11) protects the personal representative when he or she decides not to take possession of the protected homestead.
- Subsection (12) accommodates a sale of the homestead during the pendency of the lien by providing for the transfer of the lien to the proceeds either in a restricted account or escrow pending the determination and payment of the lien.
- Subsection (13) provides for an effective date of the provisions.

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<sup>11</sup> This three month rule was found in s. 733.212, F.S. (2000).

<sup>12</sup> See s. 95, ch. 2001-226, L.O.F.

**SECTIONS 11 and 18:** Sections 733.609 and 737.627, F.S., provides a mechanism to recover taxable costs and attorney's fees in cases of improper exercise of a power of a personal representative and trustee respectively.

**PROPOSED CHANGES:** This bill clarifies that taxable costs and attorney's fees for breach of a personal representative's fiduciary duty or failure of a trustee to properly exercise powers may come from direct payment from a party's interest in the trust or estate, or from other property of the party, or both.

**SECTION 12:** Section 735.2063, F.S., provides requirements for notice to creditors in summary administration.

**PROPOSED CHANGES:** Inserts "not" in subsection 2 where it was inadvertently left out in the 2001 Probate Code revision.

**SECTION 13:** Section 732.507, F.S., provides that a provision in a will of a married person that pertains to that person's spouse becomes void upon the annulment or dissolution of the parties' marriage. Section 737.106, F.S. has a similar provision, however it only provides for the "judgment for dissolution of marriage or divorce of settlor from settlor's spouse, . . . ."

**PROPOSED CHANGES:** Amends s. 737.106, F.S., regarding effect of annulment of a marriage on revocable trusts. Makes this section pertaining to revocable trust consistent with s. 732.507 pertaining to wills.

**SECTION 14:** Section 737.2035, F.S., governs the award of costs and attorney's fees in trust proceedings.

**PROPOSED CHANGES:** Clarifies that reasonable compensation for costs and attorney's fees comes from the trust if awarded. This amendment makes s. 737.2035, F.S., consistent with s. 733.106(3), F.S., in the Probate Code.

**SECTION 15:** Section 737.204, F.S., provides for court review of employment and compensation of individuals such as attorneys, accountants, or investors, employed by the trustee in administering the affairs of the trust. This section also provides notice requirements for all interested persons.

**PROPOSED CHANGES:** This bill brings s. 737.204, F.S., in conformity with s. 733.6175(3), F.S. governing similar provisions of a personal representative in a probate proceeding. Specifically, the changes provide:

- burden of showing the propriety of the employment and the reasonableness of the compensation rests with the trustee;
- court may determine reasonableness of compensation without expert testimony, however, if expert testimony is offered the court shall direct from what part of the trust his or her reasonable fee will be paid from; and
- the notice procedures in the Florida Probate Rules will govern petitions filed on a trust that is being probated.

**SECTION 16:** Section 737.404(1), F.S., provides that any power vested in three or more trustees may be exercised by a majority of them. It also provides that a dissenting trustee is not liable to a beneficiary if a dissent is expressed in writing to any of the other cotrustees.

**PROPOSED CHANGES:** This bill amends s. 737.404, F.S., to clarify that a dissenting co-trustee must give written notice of dissent from any action to all cotrustees. This change brings the trust provision in conformity with s. 733.615(2), F.S., pertaining to the powers of joint personal representative in a probate proceeding.

**SECTIONS 19 & 20:** Chapter 95 of the Florida Statutes establishes a statute of limitations for various civil actions. Actions based upon fraud have a four year statute of limitation.<sup>13</sup> Section 95.031(2)(a), F.S., establishes that statutes of limitation begin to run in fraud cases when the facts giving rise to the action are discovered, or should have been discovered with the exercise of due diligence. However, s. 95.11(3), F.S., is a statute of repose for civil action based upon fraud. This statute requires an action based upon fraud to be initiated within 12 years from the commission of the alleged fraud regardless of when the fraud was or should have been discovered.

**PROPOSED CHANGES:** This bill specifically adds “constructive fraud” to the fraud statute of limitations computation formula, so that constructive fraud cases must be brought within four years of when the facts giving rise to the action are or should have been discovered with the exercise of due diligence. Constructive fraud may be based on misrepresentation or concealment, or the fraud may consist of taking an improper advantage of the fiduciary relationship at the expense of the confiding party.<sup>14</sup> The bill also provides that this amendment to s. 95.031, F.S., is remedial in nature and will have retrospective effect.

**SECTION 21:** Provides an effective date of upon becoming law.

C. SECTION DIRECTORY:

Section 1. Amends s. 731.103, F.S., relating to evidence as to death or status

Section 2. Amends s. 731.201, F.S., relating to definitions of “beneficiary” “devisee” and “interested persons”.

Section 3. Amends s. 731.303, F.S., relating to a conflict of interest for a trustee.

Section 4. Amends s. 732.217, F.S., relating to the application of the Florida Uniform Disposition of Community Property Rights at Death Act.

Section 5. Amends s. 732.502, F.S., relating to the execution of wills.

Section 6. Amends s. 732.603, F.S., relating to antilapse.

Section 7. Amends s. 733.205, F.S., relating to probate of notarial wills.

Section 8. Amends s. 733.212, F.S., relating to notice of administration.

Section 9. Amends s. 733.2121, F.S., relating to notice to creditors probate proceedings.

Section 10. Amends s. 733.608, F.S., relating to the general powers of the personal representative.

Section 11. Amends s. 733.609, F.S., relating to improper exercise of power and breach of fiduciary duty.

Section 12. Amends s. 735.2063, F.S., relating to notice to creditors in summary administration.

Section 13. Amends s. 737.106, F.S., relating to revocable trusts prior to dissolution of marriage.

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<sup>13</sup> See s. 95.11(3)(j), F.S.

<sup>14</sup> See *Fulton v. Clewiston, Ltd.*, 129 So. 773 (Fla. 1930); *Niles v. Mallardi*, 828 So.2d 1076, 1078 (Fla. 4<sup>th</sup> DCA 2002).

Section 14. Amends s. 737.2035, F.S., relating to costs and attorney's fees in trust proceedings.

Section 15. Amends s. 737.204, F.S., relating to proceedings for review of employment of agents and review of compensation of trustee and employees of trust.

Section 16. Amends s. 737.404, F.S., relating to powers exercisable by joint trustees.

Section 17. Creates s. 737.603, F.S., relating to antilapse in trust administration.

Section 18. Amends s. 737.627, F.S., relating to costs and attorney's fees in trust administrations.

Sections 19 & 20. Amends s. 95.031, F.S., relating to computation of time with amendments to have retrospective effect.

Section 21. Provides an effective date of upon becoming law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

#### **1. Applicability of Municipality/County Mandates Provision:**

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



2. Other:

Article III, s. 6 of the Florida Constitution provides that “[e]very law shall embrace but one subject and matter properly connected therewith.” It is possible that the bill’s amendment to s. 95.031, F.S., pertaining to statute of limitations for actions based upon fraud may violate Florida’s single subject provision.

In *State v. Thompson*,<sup>15</sup> and *Heggs v. State*,<sup>16</sup> the Florida Supreme Court found that a bill containing both a criminal penalty and a civil cause of action violated the single-subject requirement. The Court has ruled that provisions of a bill must have a “natural and logical connection” in order to survive single-subject scrutiny.<sup>17</sup> Recently, the Court has enunciated the following test, “[w]hile all matters germane to, or reasonably connected with, the expressed subject may be included, the test is whether the provision is a necessary incident to the subject expressed in the title or tends to make effective or promote the object of the legislation.”<sup>18</sup> A court could find that, because this bill’s provisions relate to probate and trusts law, the bills amendment to s. 95.031, F.S., addressing statute of limitations for all fraud cases may be violative of the single subject clause.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

The proposed committee bill had no amendments and received a favorable vote in Judiciary Committee on March 12, 2003.

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<sup>15</sup> 750 So.2d 643 (Fla. 1999)

<sup>16</sup> 759 So. 2d 620 (Fla. 2000)

<sup>17</sup> *Chenoweth v. Kemp*, 396 So.2d 1122, 1124 (Fla. 1981) (quoting *Board of Public Instruction v. Doran*, 224 So.2d 693, 699 (Fla. 1969)).

<sup>18</sup> *Tormey v. State*, 824 So.2d 137, 141 (Fla. 2002)