

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2700

SPONSOR: Senator Campbell

SUBJECT: Probate and Trusts

DATE: April 16, 2003 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Roberts	Roberts	JU	Favorable
2.	_____	_____	MS	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

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 is 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 substantially amends the following sections of the Florida Statutes: 731.103, 731.201, 731.303, 732.217, 732.502, 732.603, 733.205, 733.212, 733.2121, 733.608, 733.609, 734.1025, 735.2063, 737.106, 737.2035, 737.204, 737.404, 737.627, and 95.031. The bill creates s. 737.6035, Florida Statutes.

II. Present Situation:

In 2001, the Legislature enacted an extensive rewrite of Florida's Probate Code. *See*, ch. 2001-226, L.O.F. 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 earlier changes in the Probate Code.¹

Evidence of Presumptive Death

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.

Definitional Section of the Florida Probate Code

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.

¹ The Florida Probate Code consists of Chapters 731 through 735 of the Florida Statutes.

The Florida Uniform Disposition of Community Property Rights at Death Act

Although Florida is not a community property state, it has adopted the Florida Uniform Disposition of Community Property Rights at Death Act (“Act”).² 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. Section 732.217(2), F.S., defines the whole Act as *not* being applicable to homestead property or real property held as tenants by the entirety.³ Under s. 732.225, F.S., clarification is given with respect to certain acts of married persons by recognizing that the Act does not prevent married persons from severing or altering their interests in property to which the Act applies. The reinvestment of any property to which the Act applies in real property located in Florida which becomes homestead property, will create a conclusive presumption that the spouses have agreed to terminate the community property attribute of the property reinvested.

Execution of Wills

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 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.⁴

Antilapse Provisions

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.⁵

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.⁶

² See, ss 732.216 – 732.228, F.S. The community property jurisdictions in the United States are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin, and Puerto Rico.

³ 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.” See, s. 732.227, F.S.

⁴ See, Title 10 U.S.C. § 1044d(a).

⁵ A testamentary trust is a trust created by a will and takes effect only upon the testator’s death.

⁶ Another example is the Probate Code’s simultaneous death statute found in s. 732.601, F.S.

Currently, Florida does not have a similar law that addresses lapses in inter vivos trusts.⁷

Notarial Wills

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.”

Notice Provisions

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.

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.⁸ 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.⁹

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).

Section 735.2063, F.S., provides requirements for notice to creditors in summary administration.

Personal Representatives

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.

⁷ Inter vivos trusts are created during the lifetime of the settlor and become effective during his or her lifetime.

⁸ This three month rule was found in s. 733.212, F.S. (2000).

⁹ See s. 95, ch. 2001-226, L.O.F.

Attorneys Fees and Costs

Sections 733.609 and 737.627, F.S., provide 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. Section 737.2035, F.S., governs the award of costs and attorney's fees in trust proceedings.

Effects of Annulment on Revocable Trusts

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, . . ."

Trustees

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.

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 co trustees.

Fraud and Statute of Limitations

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.¹⁰ 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.

III. Effect of Proposed Changes:

A section by section analysis of the bill follows:

Section 1: 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.¹¹ 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.

¹⁰ See s. 95.11(3)(j), F.S.

¹¹ 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.

Sections 2 & 3: Clarifies when a trustee of a trust in a pour-over or testamentary trust arrangement¹² 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 is also a personal representative 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; and
- 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.

Section 4: Amends s. 732.217(2), F.S., to strike the exception of homestead property from the application of the Florida Uniform Disposition of Community Property Rights at Death Act.

Section 5: Adds a new subsection (3) to s. 732.502, F.S., to incorporate 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 & 18: Section 6 amends s. 732.603, F.S., to address gaps in the antilapse coverage concerning beneficiaries deemed to have predeceased a decedent by operation of law. Section 18 creates s. 737.6035, F.S., to provide that similar antilapse provisions apply to inter vivos trusts.

Section 7: Amends s. 733.205(1), F.S., to provide for authentication of a foreign notary’s official position, signature and seal of office by means of the Hague Convention of 1961.¹³

Section 8: 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 sections 2 and 3 of the bill pertaining to conflicts of interest.

¹² 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, 6th edition.

¹³ 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: Amends s. 733.2121(1), F.S., to eliminate 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: Amends s. 733.608(2), F.S., and adds new subsections (3) through (13), to add 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.

Sections 11 & 19: Amends s. 733.609 and 737.627, F.S., to clarify 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: Amends s. 734.1025(1), F.S., relating to certain nonresident decedents to conform to changes made in Section 5 of the bill.

Section 13: Amends s. 735.2063, F.S., relating to notice to creditors to insert "not" in subsection 2 where it was inadvertently left out in the 2001 Probate Code revision.

Section 14: Amends s. 737.106, F.S., regarding effect of annulment of a marriage on revocable trusts to make this section pertaining to revocable trusts consistent with s. 732.507 pertaining to wills.

Section 15: 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 16: 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 17: Amends s. 737.404, F.S., to clarify that a dissenting co-trustee must give written notice of dissent from any action to all co trustees. 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 20 & 21: Specifically add "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.¹⁴ The bill also provides that this amendment to s. 95.031, F.S., is remedial in nature and will have retrospective effect.

Sections 22 through 32: Reenact certain provisions of law to incorporate by reference amendments made in the bill.

Section 33: Provides that this act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

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

B. Public Records/Open Meetings Issues:

None.

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

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

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*,¹⁵ and *Heggs v. State*,¹⁶ 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.¹⁷ 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.”¹⁸ 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.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

¹⁵ 750 So.2d 643 (Fla. 1999)

¹⁶ 759 So. 2d 620 (Fla. 2000)

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

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

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
