

# 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.)

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Prepared By: Judiciary Committee

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BILL: CS/SB 1368

SPONSOR: Judiciary Committee and Senator Aronberg

SUBJECT: Disclaimer of Property Interests Act

DATE: March 16, 2005

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Chinn	Maclure	JU	Fav/CS
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This committee substitute repeals Florida's existing statutory disclaimer statutes, sections 689.21 and 732.801, Florida Statutes, governing disclaimer of non-testamentary property interests and testamentary property interests, respectively. In place of the repealed statutes, the committee substitute creates a new chapter in the Florida Statutes, Chapter 739, which will apply regardless of the nature of the property interest to be disclaimed. The committee substitute is based upon the Uniform Disclaimer of Property Interests Act (the "UDPIA") developed by the National Conference of Commissioners on Uniform State Laws (the "NCCUSL") in 1999. While the language of the committee substitute is *based* upon UDPIA, there are slight revisions to allow for nuances of Florida law.

This committee substitute creates Chapter 739, consisting of the following sections of the Florida Statutes: 739.101, 739.102, 739.103, 739.104, 739.201, 739.202, 739.203, 739.204, 739.205, 739.206, 739.207, 739.301, 739.401, 739.402, 739.501, 739.601, and 739.701. This committee substitute amends section 731.201, Florida Statutes, and repeals sections 689.21 and 732.801, Florida Statutes.

## II. Present Situation:

Disclaimer of property interests is governed by two sections of the Florida Statutes, ss. 689.21 and 732.801, F.S., and the common law.<sup>1</sup> Section 689.21, F.S., applies when the interest to be disclaimed is under an inter vivos trust or is an interest in jointly held property, while s. 732.801,

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<sup>1</sup> Neither section abridges the right of a disclaimant to make a disclaimer or renunciation under any other law, i.e. the common law. Pursuant to s. 2.01, F.S., common law and the statutes of England up to July 4, 1776, are in force in Florida to the extent that the State has not passed laws inconsistent with the common law, thus abrogating it.

F.S., applies to interests disbursed according to will, testamentary trust, or intestate succession. With the exception of minor revisions, neither section has seen significant substantive revision since the 1970s.<sup>2</sup>

### **Power and Scope of Disclaimer**

As the statutes now read, the “power to disclaim” connotes a *beneficiary’s* power to disclaim an interest in *property*. The current statutory language does not extend the right to disclaim to fiduciaries—only beneficiaries. An interest in property is defined by both statutes to include the following:

- The whole of any property, real or personal, legal or equitable, present or future interest, or any fractional part, share, or portion of property or specific assets thereof;
- Any estate in the property; or
- Any power to appoint, consume, apply, or expend property, or any other right, power, privilege, or immunity relating to it.<sup>3 4</sup>

The right to disclaim a *fiduciary power* is not permitted as the statutes now read. However, a guardian or a personal representative may disclaim for a minor, incompetent person, or deceased beneficiary where the circuit court has determined that it is in the best interests of the affected parties.<sup>5</sup> In deciding whether disclaimer is in the best interests of the affected parties, the court must consider: whether the disclaimer would be in the best interests of those interested in the estate of the beneficiary for whom the disclaimer is to be made; whether the disclaimer is in the best interests of those who would take the beneficiary’s interest by virtue of the disclaimer; and whether the disclaimer would be detrimental to the best interests of the beneficiary.

### **Filing Requirement**

A disclaimer of property must be in writing and becomes irrevocable when it is filed in any circuit court in the state.<sup>6</sup> The filed writing must describe the interest in property to be disclaimed, and the writing must be signed, witnessed, and acknowledged in the manner provided for deeds of real estate.<sup>7</sup> In addition, a copy of the disclaimer must be delivered to the personal representative, trustee, or other person having legal title to or possession of the property in which the disclaimed interest exists.

For a disclaimer of property passing under a non-testamentary instrument to be valid, the disclaimer must be filed for recording within 12 months after the effective date of the nontestamentary instrument creating the interest or 12 months after the beneficiary’s interest has

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<sup>2</sup> Under s. 3, ch. 2002-233, L.O.F., s. 689.21, F.S., was amended to impose a nine-month statute of limitations during which a survivor of a tenancy by the entirety must disclaim property and to clarify that such disclaimed property does not become homestead property for the purposes of descent and distribution under ss. 732.401 and 732.4015, F.S.

<sup>3</sup> s. 689.21(1)(d)-(2), F.S.

<sup>4</sup> s. 732.801(1)(d)-(2), F.S.

<sup>5</sup> s. 689.21(2)(b), F.S. (Affected parties include the beneficiary, interested in the estate of the beneficiary, and those who take the beneficiary’s interests by virtue of the disclaimer.)

<sup>6</sup> For real estate, the disclaimer must be filed in the circuit court of the county or counties where the real estate is located.

<sup>7</sup> s. 695.26, F.S., provides requirements for recording instruments affecting real property.

become indefeasibly fixed.<sup>8</sup> Where the property interest is the result of a survivorship interest, the disclaimer must take place within nine months after the death of the deceased cotenant.

The time limit for disclaimer of property under a testamentary instrument or intestate succession is nine months after the event giving rise to the right to disclaim (including the death of the decedent), regardless of whether the property is a joint tenancy.<sup>9</sup> If the disclaimant or the amount of property to which the disclaimant is entitled has not been ascertained at the time of the event giving rise to the property right, the disclaimant has six months from the time that the interest is ascertained during which to file a disclaimer.

### **Effect of Disclaimer**

Unless the instrument granting the property interest to be disclaimed provides otherwise, the interest disclaimed passes in the same manner as if the disclaimant had died immediately preceding the death or other event that causes the disclaimant's interest to become indefeasibly fixed. The date of the disclaimer relates back to the time of the event precipitating the disclaimant's property interest, and the property disclaimed never vests in the disclaimant.<sup>10</sup> A disclaimer is waived if the disclaimant is insolvent or has done any of the following:

- Voluntarily assigned or transferred, contracted to assign or transfer, or encumbered an interest in real property;
- Given a written waiver of the right to disclaim the succession to an interest in real or personal property; or
- Sold or otherwise disposed of property pursuant to judicial process before recording a disclaimer.

The statute does not address the effect of a failed disclaimer on the disposition of the property.

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

Committee substitute for Senate Bill 1368 enacts the "Florida Uniform Disclaimer of Property Interests Act" (the "Act"). The committee substitute would unify ss. 689.21 and 732.801, F.S., so that disclaimer of property is addressed in one chapter, Chapter 739, regardless of whether the property is the result of a testamentary or non-testamentary instrument. The proposed language is based upon the Uniform Disclaimer of Property Interests Act (the "UDPIA") promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1999.<sup>11</sup> While the new language retains a great deal of the principles codified in Florida's existing statutes, the committee substitute modifies disclaimer of property interests as follows:

- Establishes Chapter 739, of the Florida Statutes, as the only source of law for disclaimers;
- Expands the power to disclaim to include fiduciary powers and fiduciary assets;
- Removes the statute of limitations for disclaimer of property interest;

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<sup>8</sup> s. 689.21(5), F.S.

<sup>9</sup> s. 732.801(5), F.S.

<sup>10</sup> Note that while the disclaimer may be valid for purposes of Florida's disclaimer law, the disclaimer may not be valid with respect to federal tax liability.

<sup>11</sup> Gans, Richard R., "Disclaimer Reform is on the Way," *ActionLine*, Vol. XXV, No. 4, Summer 2004, pp. 21-22.

- Removes filing requirement for disclaimer of property interests that are not real estate;
- Allows courts to give greater weight to the totality of the circumstances when considering disclaimer made for minors or incapacitated persons; and
- Addresses effect of failed disclaimer.

The proposed creation of Chapter 739, F.S., would unify the two sections of law that currently address disclaimer of property so that disclaimer would be applied uniformly, regardless of whether a property interest is created by a testamentary or non-testamentary instrument. In addition, by establishing that Chapter 739 is the “exclusive means by which a disclaimer may be made under Florida law,” the committee substitute abrogates the application of the common law for disposition of disclaimed property interests. In providing one avenue for disposition of disclaimer, procedures for and consequences of disclaimers could be more predictable because the statute would not be subject to changing court decisions.

The proposed language would permit fiduciaries to disclaim assets or fiduciary powers subject to court approval.<sup>12</sup> By defining “disclaimer” to include “refusal to accept . . . power over property,” the scope of disclaimer is broadened to include any power over property that gives the powerholder a right to control property, whether it be cast in the form of power of appointment or a fiduciary’s management power over property or discretionary power of distribution over income or corpus.<sup>13</sup> There is no standard provided for the court’s assessment of whether such fiduciary disclaimer should be allowed; presumably the lack of a standard will provide flexibility to the courts to consider the totality of the circumstances.

The committee substitute removes the statute of limitations during which one must file a disclaimer of property for the disclaimer to take effect. The lack of a time limit for disclaimer would have no effect on federal tax law with respect to disclaimed property but would provide flexibility where tax concerns are not paramount in the disclaimant’s decision to refuse to accept an interest in property. The disclaimant will also no longer have to file a disclaimer in circuit court, unless one disclaims an interest in real property. For property other than real property, the disclaimer need only be delivered to the person who, depending upon the interest to be disclaimed, must dispose of the disclaimed interest such as a personal representative or a trustee.

With respect to disclaimer of property interests for a minor or incapacitated person, the committee substitute allows the court to consider the totality of the circumstances when ruling on whether to allow a guardian to disclaim on behalf of a minor. This authority would allow the court to consider the beneficiaries as a group and not just the one minor child beneficiary in situations where, for example, such consideration could impact tax savings objectives.<sup>14</sup> In addition, court approval would not be required for a natural guardian to disclaim an interest that a minor would otherwise receive solely by reason of another disclaimer.<sup>15</sup>

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<sup>12</sup> CS/SB 1368, page 5, lines 13-29. If the instrument grants the right to disclaim to the fiduciary, court approval of disclaimer is not required.

<sup>13</sup> CS/SB 1368, page 3, lines 21-23.

<sup>14</sup> Gans, Richard R., “Disclaimer Reform is on the Way,” *ActionLine*, Vol. XXV, No. 4, Summer 2004, pp. 21-22.

<sup>15</sup> CS/SB 1368, page 5, lines 22-29, allows disclaimer for a minor only when the disclaimed interest or power would not pass to or for the benefit of the natural guardian as a result of the disclaimer.

Finally, the committee substitute would also clearly address what happens to a property interest when a disclaimer fails. The Act provides that the attempted disclaimer is ineffective and that the property subject to the failed disclaimer remains in the hands of the would-be disclaimant.

This committee substitute provides an effective date of July 1, 2005.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The committee substitute would provide ease in affecting a disclaimer by a private individual, eliminating the requirement that a disclaimant must file the disclaimer in circuit court when the property is not real estate.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.



## **VIII. Summary of Amendments:**

None.

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

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