

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1665 CS Disclaimers of Property Interests
SPONSOR(S): Kottkamp
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1368

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	5 Y, 0 N, w/CS	Kruse	Billmeier
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

HB 1665 repeals Florida's existing statutory disclaimer statutes, ss. 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 In place of the repealed statutes, the bill creates a new chapter, Chapter 739, which will apply regardless of the nature of the property interest to be disclaimed. The bill maintains the general principles found in the current statutes regarding disclaimers, but also extends the power to disclaim to fiduciary powers and fiduciary assets. The bill 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.

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

The bill takes effect July 1, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill eliminates the requirement that a disclaimant must file a disclaimer in circuit court when the property is not real estate.

B. EFFECT OF PROPOSED CHANGES:

Disclaimer of Property Interests

A 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.¹ 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, 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.²

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.³

The right to disclaim a fiduciary power is not permitted. 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.⁴ 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.⁵ The filed writing must describe the interest in property to be disclaimed, and the writing

¹ 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.

² In 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.

³ Section 689.21(1)(d)-(2), F.S.; s. 732.801(1)(d)-(2), F.S.

⁴ Section 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.)

⁵ For real estate, the disclaimer must be filed in the circuit court of the county or counties where the real estate is located.

must be signed, witnessed, and acknowledged in the manner provided for deeds of real estate.⁶ 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 become indefeasibly fixed.⁷ 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.⁸ 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.⁹ 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.

HB 1665

The bill enacts the "Florida Uniform Disclaimer of Property Interests Act" (the "Act"). The bill 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 1999.¹⁰ While the new language retains many of the principles codified in Florida's existing statutes, the bill 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;
- Removes filing requirement for disclaimer of property interests that are not real estate;

⁶ Section 695.26, F.S., provides requirements for recording instruments affecting real property.

⁷ Section 689.21(5), F.S.

⁸ Section 732.801(5), F.S.

⁹ 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.

¹⁰ Gans, Richard R., "Disclaimer Reform is on the Way," ActionLine, Vol. XXV, No. 4, Summer 2004, pp. 21-22.

- Allows courts to give greater weight to the totality of the circumstances when considering disclaimer made for minors or incapacitated persons; and
- Addresses the effect of a failed disclaimer.

In addition, by establishing that Chapter 739 is the “exclusive means by which a disclaimer may be made under Florida law,” the bill 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 may 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. By defining “disclaimer” to include “refusal to accept an interest in 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. There is no standard provided for the court’s assessment of whether such fiduciary disclaimer should be allowed; the lack of a standard may provide flexibility to the courts to consider the totality of the circumstances.

The bill 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 bill 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.¹¹ 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.

The bill also provides how it applies to existing relationships by stating that, except under certain circumstances, an interest in or power over property existing on July 1, 2005, as to which the time for delivering or filing a disclaimer under laws superseded by this chapter has not expired, may be disclaimed after July 1, 2005.

Finally, the bill also addresses under what circumstances a disclaimer has failed and will be considered ineffective.

C. SECTION DIRECTORY:

Section 1. Creates ch. 739, F.S, consisting of ss. 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.

- Section 739.101 provides a short title, the “Florida Uniform Disclaimer of Property Interests Act.”
- Section 739.102 provides definitions.

¹¹ Gans, Richard R., “Disclaimer Reform is on the Way,” ActionLine, Vol. XXV, No. 4, Summer 2004, pp. 21-22.

- Section 739.103 provides that this chapter applies to disclaimers of any interest in or power over property, whenever created, and except for certain circumstances, this chapter is the exclusive means by which a disclaimer may be made under the laws of this state.
- Section 739.104 establishes the general requirements for the power to disclaim.
- Section 739.201 establishes the rules for making a disclaimer of an interest in property.
- Section 739.202 provides for a disclaimer of rights of survivorship in jointly held property.
- Section 739.203 provides for a disclaimer of property held as tenancy by the entirety.
- Section 739.204 provides for a disclaimer of interest by a trustee.
- Section 739.205 provides for a disclaimer of a power of appointment or other power not held in a fiduciary capacity.
- Section 739.206 provides a disclaimer by an appointee, object, or taker in default of an exercise of a power of appointment.
- Section 739.207 provides for a disclaimer of power held in a fiduciary capacity.
- Section 739.301 provides for the delivery or filing of a disclaimer.
- Section 739.401 provides that a disclaimer may be made at any time unless barred by s. 739.402.
- Section 739.402 provides the circumstances in which a disclaimer is barred or limited.
- Section 739.501 provides a tax-qualified disclaimer.
- Section 739.601 provides for a recording of a disclaimer relating to real estate.
- Section 739.701 provides for how this law applies to existing relationships by stating that, except as provided in s. 739.402, an interest in or power over property existing on July 1, 2005, as to which the time for delivering or filing a disclaimer under laws superseded by this chapter has not expired, may be disclaimed after July 1, 2005.

Section 2. Amends s. 731.201, F.S., by adding in a cross-reference to new ch. 739, F.S., to make a technical change.

Section 3. Amends s. 121.091, F.S., to add in a cross reference to new ch. 739, F.S., and delete a cross reference to s. 689.21, F.S., which is repealed by this bill.

Section 4. Amends s. 710.121, F.S., to add in a cross reference to new ch. 739, F.S., and delete a cross reference to s. 689.21, F.S., which is repealed by this bill.

Section 5. Repeals ss. 689.21 and 732.801, F.S.

Section 6. Provides that the bill takes effect July 1, 2005.

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:

This bill may assist an individual in affecting a disclaimer by eliminating the requirement that a disclaimant must file the disclaimer in circuit court when the property is not real estate.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

N/A.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 30, 2005, the Civil Justice Committee considered the bill and adopted one amendment. The amendment provided that tax-qualified disclaimers can be made of vested future interests in will substitutes such as revocable trusts. The bill, as amended, was reported favorably as a committee substitute.