

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 941

Probate

SPONSOR(S): Frishe

TIED BILLS:

IDEN./SIM. BILLS: SB 2048

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Safety & Security Council</u>	<u>13 Y, 0 N, As CS</u>	<u>Thomas/Davis</u>	<u>Havlicak</u>
2) <u>Policy & Budget Council</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
3) <u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
4) <u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
5) <u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>

SUMMARY ANALYSIS

Florida's Probate Code provides, among many other provisions, for intestate succession, i.e., how property is distributed among heirs when a decedent dies without leaving a valid will. The bill reinstates a provision in law that an intestate estate may pass to the descendants of the decedent's great-grandparents if any descendant of the great-grandparents was a Holocaust victim. The ability for the descendant to receive intestate property under this provision is effective through December 31, 2010.

The bill amends provisions in law regarding property that is classified as "exempt property" under the Florida Probate Code to make the following changes:

- Household furniture and appliances – Increased to \$20,000 from \$10,000.
- Motor vehicles – Up to two which do not have a gross vehicle weight over 15,000 pounds, instead of all automobiles held in the decedent's name.
- All qualified tuition programs authorized by s. 529 of the Internal Revenue Code, rather than only Florida Prepaid College Program contracts and Florida College Savings agreements.

The bill revises language relating to the standards of care applicable to a personal representative by deleting a cross-reference. The existing cross-reference is inaccurate and limits the applicable standards. Under the bill, a personal representative will have to adhere to all standards of care applicable to trustees.

The bill appears to have an indeterminate fiscal impact on state government.

The bill takes effect on July 1, 2008.

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

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DATE: 4/17/2008

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty – the bill appears to increase the options of an individual regarding the conduct of their own affairs.

B. EFFECT OF PROPOSED CHANGES:

Escheat

When a person dies and leaves an estate without being survived by a person entitled to part or all of the estate, such property shall escheat (revert) to the state.¹ Property that escheats to the state is sold and the proceeds from the sale are paid to the Chief Financial Officer and deposited in the State School Fund.²³ A person claiming to be entitled to the proceeds from the sale of escheated property may reopen the administration to assert entitlement within 10 years after payment is made to the CFO.⁴ After 10 years, however, the state's rights to the proceeds are absolute and the property has escheated to the state.⁵

Section 732.103, F.S., contains the intestate succession rules that are used to determine entitlement to property when a decedent dies intestate (without disposing of the property via a will). If there is no will, property descends as follows:

- Surviving spouse of the decedent as provided in s. 732.102, F.S.⁶ If none then:
- Descendants of the decedent. If none then:
- Equally to the father and mother of the decedent, or the survivor of them. If none then:
- Brothers and sisters of the decedent and the descendants of deceased brothers and sisters.

If none of the above are entitled to the property then the estate is divided equally (half and half) between the decedent's paternal and maternal kindred as follows:

- To the grandfather and grandmother equally, or to the survivor of them. If none, then:
- Uncles and aunts and descendants of deceased uncles and aunts of the decedent. If none, then:

¹ Section 732.107, F.S.

² Section 732.107(2), F.S.

³ The State School Fund is also known as the State School Trust Fund, created pursuant to s. 1010.71. F.S.

⁴ Section 732.107(3), F.S.

⁵ Property held by a guardian that cannot make a distribution to a ward becomes the final property of the state 5 years after it is turned over to the CFO pursuant to s. 744.534, F.S.

⁶ Section 732.102, F.S., provides The intestate share of the surviving spouse is:

(1) If there is no surviving descendant of the decedent, the entire intestate estate.

(2) If there are surviving descendants of the decedent, all of whom are also lineal descendants of the surviving spouse, the first \$60,000 of the intestate estate, plus one-half of the balance of the intestate estate. Property allocated to the surviving spouse to satisfy the \$60,000 shall be valued at the fair market value on the date of distribution.

(3) If there are surviving descendants, one or more of whom are not lineal descendants of the surviving spouse, one-half of the intestate estate.

- To other kindred who survive, in the order stated above.
- If there is no kindred among the decedent's paternal and maternal line as described above, then the entire property goes to the kindred of the last deceased spouse of the decedent as if the deceased spouse had survived the decedent and then died intestate.

In 2004,⁷ the Legislature created subsection (6) of s. 732.103, F.S., to temporarily expand the above intestacy succession if any of the descendants of the decedent's great-grandparents were Holocaust victims as defined in s. 626.9543(3)(a), F.S.⁸ In such a circumstance, a court was required to allow any such descendant to meet a reasonable, not unduly restrictive, standard of proof to substantiate his or her lineage.⁹ Outside of this exception, the intestacy statute only looks to the grandparents of the decedent, not great-grandparents, to locate an heir. However, the expansion was only effective for proceedings filed on or before December 31, 2004.¹⁰

Unclaimed Property

Generally, all property, real and personal, and every right to property of any nature are subject to escheat to the state.¹¹ Abandoned property is also subject to escheat to the state under appropriate statutes.¹² The escheat of abandoned property does not constitute a taking of property without due process of law in violation of the U.S. Constitution.¹³

Unclaimed property consists of any funds or other property, tangible or intangible that has remained unclaimed by the owner for a certain period of time.¹⁴ Essentially, the unclaimed property laws cover financial accounts, but not real property or other personal property such as automobiles, furniture, jewelry (if not in a safe deposit box), and other items. Savings and checking accounts, money orders, travelers' checks, uncashed payroll or cashiers' checks, stocks, bonds, other securities, insurance policy payments, refunds, security and utility deposits, and contents of safe deposit boxes are all potentially unclaimed property.¹⁵ Holders of unclaimed property, which typically include banks and insurance companies, are required to submit unclaimed property to the Department of Financial Services (DFS).¹⁶ There is no time limit for the owner to make a claim for unclaimed property.

If the property remains unclaimed, all proceeds from abandoned property are then deposited by the DFS into the State School Trust Fund within the Department of Education (State School Fund), except for a \$15 million balance that is retained in a separate account (the Unclaimed Property Trust Fund) for the prompt payment of verified claims.¹⁷ Approximately \$1.5 billion has been transferred to the Florida Department of Education since the program's inception, including \$267,095,187 transferred to the State School Fund in Fiscal Year 2005-2006.

⁷ Section 145, ch. 2004-390, L.O.F.

⁸ "Holocaust victim" is defined as "any person who lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups of persons between 1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, or countries allied with Nazi Germany."

⁹ Section 732.103(6), F.S.

¹⁰ *Ibid.*

¹¹ *See* ch. 716, F.S.

¹² Section 716.02, F.S.

¹³ *Cockrill v. California*, 268 U.S. 258 (1925).

¹⁴ Sections 717.102 and 717.1035, F.S.

¹⁵ Sections 717.104 through 717.116, F.S.

¹⁶ Section 717.119, F.S.

¹⁷ Section 717.123(1), F.S., provides that "All funds received under this chapter, including the proceeds from the sale of unclaimed property under s. 717.122, shall forthwith be deposited by the department in the Unclaimed Property Trust Fund. The department shall retain, from funds received under this chapter, an amount not exceeding \$15 million from which the department shall make prompt payment of claims allowed by the department and shall pay the costs incurred by the department in administering and enforcing this chapter. All remaining funds received by the department under this chapter shall be deposited by the department into the State School Fund."

Any person claiming an interest in unclaimed property may file a claim with the department for unclaimed property.¹⁸ Within 90 days of the receipt of a properly submitted claim for unclaimed property (though potentially extendable for 60 additional days for good cause), the department determines the claim.¹⁹ When a claim is determined in favor of the claimant, the department delivers the property or the amount the department received from the sale of the property plus any applicable interest.²⁰ An estate may claim unclaimed property only after the heir or legatee of the decedent entitled to the property has been located.²¹ An estate that receives unclaimed property before the heir or legatee has been located is personally liable for the unclaimed property and must immediately return the full amount of the unclaimed property to the DFS.²²

Probate – Exempt Property

Certain property is made “exempt” by the probate code.²³ Exempt property is property that is exempt from the claims of creditors, and thus is given to beneficiaries notwithstanding whether there are sufficient assets to pay all of the claims against the estate.²⁴ Exempt property as set forth in the Probate Code is in addition to protected homestead,²⁵ statutory entitlements,²⁶ and property passing under the will or by intestate succession.²⁷ Exempt property includes:

- (a) Household furniture, furnishings, and appliances in the decedent's usual place of abode up to a net value of \$10,000 as of the date of death.
- (b) All automobiles held in the decedent's name and regularly used by the decedent or members of the decedent's immediate family as their personal automobiles.
- (c) Stanley G. Tate Florida Prepaid College Program contracts purchased and Florida College Savings agreements established under part IV of chapter 1009.
- (d) All benefits paid pursuant to s. 112.1915 (teachers and school administrators; death benefits).²⁸

Exempt property values have not been changed since 1981. When the statute was first created in 1974, it exempted up to \$5,000 in furniture and appliances and up to \$1,000 in personal effects.²⁹ In 1975, automobiles were added to the \$5,000 limit for furniture and appliances.³⁰ In 1981, the statute was amended to include as exempt property all automobiles used as personal vehicles, regardless of the value, up to \$10,000 in furniture, furnishings, or appliances, and retained the \$1,000 for personal effects.³¹ The \$1,000 exemption for personal effects was removed in 1985.³²

¹⁸ Section 717.124, F.S.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ 717.12405, F.S.

²² *Ibid.*

²³ See part IV, ch. 732, F.S.

²⁴ Section 732.402, F.S.

²⁵ Section 731.201(32), F.S., provides that the term “‘Protected homestead’ means the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned as tenants by the entirety is not protected homestead.”

²⁶ The term “statutory entitlements” is not defined but would include homestead, exempt property, elective share, pretermitted share, family allowance, and any other property that a person is entitled to receive from an estate by statute.

²⁷ Section 732.402(4), F.S.

²⁸ Section 732.402(2), F.S.

²⁹ Section 1, ch. 74-106, L.O.F.

³⁰ Section 19, ch. 75-220, L.O.F.

³¹ Section 1, ch. 81-238, L.O.F.

³² Section 3, ch. 85-79, L.O.F.

Personal Representative – General Duties

The duties and powers of a personal representative³³ commence upon appointment, although prior acts that are beneficial to the estate occurring before appointment are ratified by the appointment of the personal representative.³⁴ The general duties of a personal representative include:

- Observing, as a fiduciary, the standards of care applicable to trustees as described by part VII of chapter 736.³⁵
- Settling and distributing the estate of the decedent in accordance with the terms of the decedent's will and the Probate Code as expeditiously and efficiently as is consistent with the best interests of the estate.
- Using the authority conferred by the Probate Code, the authority in the will, if any, and the authority of any order of the court, for the best interests of interested persons, including creditors.³⁶

Proposed Changes

The bill amends 732.103(6), F.S., granting specified Holocaust victims the ability to make a claim for escheated property. The bill reinstates a provision in subsection (6) stating that an intestate estate may pass to the descendants of the decedent's great-grandparents if any descendant of the great-grandparents was a Holocaust victim as defined in s. 626.9543(3)(a), F.S.³⁷ The court is required to allow a qualifying claimant to meet a reasonable and not unduly restrictive standard of proof to substantiate his or her lineage and the validity of the claim for escheated property. The subsection only applies to estate property deposited with the Chief Financial Officer by escheat pursuant to s. 732.107, F.S., and is expanded to allow property to descend even if the 10 year escheatment period has run. The ability for the descendant to receive intestate property under this section is effective through December 31, 2010.

The bill amends s. 732.402, F.S., regarding property that is classified as "exempt property" under the Florida Probate Code. The bill makes the following changes to the property that a spouse or surviving children of a decedent have a right to:

- Household furniture and appliances – Increased to \$20,000 from \$10,000.
- Motor vehicles – Up to two which do not have a gross vehicle weight over 15,000 pounds, instead of all automobiles held in the decedent's name.
- All qualified tuition programs authorized by s. 529 of the Internal Revenue Code, rather than only Florida Prepaid College Program contracts and Florida College Savings agreements.

The bill amends s. 733.602(1), F.S., relating to the standards of care applicable to a personal representative in administering a probate estate. The bill revises language relating to the standards of care applicable to a personal representative by deleting a cross-reference to part VII of ch. 736, F.S.

³³ Section 731.201(27), F.S., provides that the "personal representative" is "the fiduciary appointed by the court to administer the estate and refers to what has been known as an administrator, administrator cum testamento annexo, administrator de bonis non, ancillary administrator, ancillary executor, or executor."

³⁴ Section 733.601, F.S.

³⁵ In 2006, this cross-reference was incorrectly changed to part VII of ch. 736, F.S. See s. 37, ch. 2006-217, L.O.F. The duties and powers of trustees statutes were moved to part VIII of ch. 736, F.S., that year, not part VII. See s. 8, ch. 2006-217, L.O.F.

³⁶ Section 733.602, F.S.

³⁷ See footnote 8 above.

This existing cross-reference is inaccurate and limits the applicable standards. By deleting the cross-reference, a personal representative will have to adhere to all standards of care applicable to trustees.

The bill takes effect on July 1, 2008.

C. SECTION DIRECTORY:

Section 1: Amends s. 732.103, F.S., relating to share of other heirs.

Section 2: Amends s. 732.402, F.S., relating to exempt property.

Section 3: Amends s. 733.602, F.S., relating to general duties of personal representatives.

Section 4: Provides an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Indeterminate. See D. Fiscal Comments below.

2. Expenditures:

Indeterminate. See D. Fiscal Comments below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

The bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will allow certain descendants of Holocaust victims to claim property that has escheated to the state. Professional heir finders may benefit from this legislation if they are able to find heirs qualified under the bill for escheated estates.

D. FISCAL COMMENTS:

This bill appears to have an indeterminate fiscal impact on state government. Funds that escheat to the state are deposited into the State School Trust Fund within the Department of Education, except for a \$15 million balance that is retained in the Unclaimed Property Trust Fund that is maintained to pay claims and cover administrative costs.³⁸ Money in the State School Trust Fund is used entirely to fund

³⁸ Section 717.123(1), F.S., provides that "All funds received under this chapter, including the proceeds from the sale of unclaimed property under s. 717.122, shall forthwith be deposited by the department in the Unclaimed Property Trust Fund. The department shall retain, from funds received under this chapter, an amount not exceeding \$15 million from which the department shall make prompt

public education. The Department of Financial services states that the amount of property that escheats to the state varies each year. There is no way to predict how many estates will avoid escheating to the state if this bill becomes law. DFS estimates that as of Fiscal Year 2008-2009, a total of \$29,308,732.76 is expected to have escheated to the state from estates where a lawful heir could not be found (this is the anticipated total of all estates to have ever escheated to the state). Under the proposed bill, all \$29.3M is potentially subject to claims by qualified parties, however, there is no way to know how many, if any, of these escheated estates will have a beneficiary that qualifies under the bill.

The bill does not provide the funding source for payment of claims of escheated property, but such funds would presumably be paid from the Unclaimed Property Trust Fund as currently provided by statute.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

Equal Protection

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that a state may not “deny to any person within its jurisdiction the equal protection of the laws.” Article I, section 2 of the Florida Constitution further provides that “[a]ll natural persons ... are equal before the law.” Both the federal and state Equal Protection Clauses are designed to prevent any person or class of persons from being singled out as a target for arbitrary and unjust discrimination.³⁹ They do not require that all persons be treated identically but rather that the law apply equally to all persons who are similarly situated.⁴⁰

In most cases, a governmental classification must merely be rationally related to a legitimate state purpose, i.e., reasonable classifications other than those involving suspect classes of persons or fundamental rights are generally permissible, so long as the classifications are not arbitrary and are based on some difference in the classes having a substantial relation to the purpose of the legislation.⁴¹ A litigant could argue that there is not a rational relationship with respect to the classification in this bill, particularly if that litigant sought to claim proceeds of an escheated estate through descent from a victim of genocide or crimes against humanity other than the Holocaust and that the bill distinguishes between persons (collateral heirs such as second cousins) whose claims for escheated property are allowed or prohibited, depending on whether they are descendants of Holocaust victims.

payment of claims allowed by the department and shall pay the costs incurred by the department in administering and enforcing this chapter. All remaining funds received by the department under this chapter shall be deposited by the department into the State School Fund.”

³⁹ See *Washington v. Davis*, 426 U.S. 229 (1976); *Haber v. State*, 396 So.2d 707 (Fla. 1981).

⁴⁰ See *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (“all persons similarly circumstanced shall be treated alike”); *Duncan v. Moore*, 754 So.2d 708 (Fla. 2000).

⁴¹ See, e.g., *Vacco v. Quill*, 521 U.S. 793 (1997); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Williams v. Pryor*, 229 F.3d 1331 (11th Cir. 2000); *State v. Muller*, 693 So.2d 976 (Fla. 1997); *Libertarian Party of Florida v. Smith*, 687 So.2d 1292 (Fla. 1996); *Lite v. State*, 617 So.2d 1058 (Fla. 1993).

Prohibited Special Law

This bill may raise concerns under a provision in Florida's State Constitution that prohibits special laws that effectuate a change in the laws of descent.⁴² A special law is one relating to, or designed to operate on, particular persons or things, or one that purports to operate on classified persons or things when classification is not permissible or the classification adopted is illegal.⁴³ If a court were to find that this bill was relating to, or designed to operate on, a particular person, it could find that it is a special law and therefore violates the State Constitution.

B. RULE-MAKING AUTHORITY:

It appears that the Department of Financial Services has the necessary authority to adopt any rules that may be required to implement the provisions of this bill.⁴⁴

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On April 16, 2008, the Safety & Security Council adopted a strike-all amendment. The amendment provided for the following:

- Places the escheated property provision of the bill in s. 732.103, F.S., where it is more appropriately suited. This section will extend until 2010 the provisions that the beneficiary, heir, or descendant of a Holocaust victim is allowed to make a claim for escheated property if the Holocaust victim is a lineal descendant of the great-grandparent of the decedent.
- Updates the exempt property statute, 732.402, F.S., to exempt up to two motor vehicles, each weighing 15,000 pounds or less and increases the limit on the amount of household furniture, furnishings and appliances which can pass from a decedent to a spouse or children free of the claims of creditors from \$10,000 to \$20,000. The amendment also updates and corrects the statutory reference to include all exempt qualified tuition programs and advance tuition payment contracts authorized by s. 529 of the Internal Revenue Code of 1986, as amended.
- Amends s. 733.602, F.S., relating to the general duties of a personal representative, to delete an inaccurate cross-reference to the Florida Trust Code. By removing this cross-reference, all laws relating to trustees will be applicable.

⁴² FLA. CONST. art III, s. 11(a)(13), which prohibits a special law pertaining to "effectuation of invalid deeds, wills or other instruments, or change in the law of descent."

⁴³ *Schrader v. Florida Keys Aqueduct Authority*, 840 So.2d 1050, (Fla. 2003); *Bryan v. State*, 753 So.2d 1244, (Fla. 2000); *Department of Business Regulation v. Classic Mile, Inc.*, 541 So.2d 1155, (Fla. 1989).

⁴⁴ Section 717.138, F.S., provides that the "department has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter."

This analysis is drafted to the bill as amended by the strike-all amendment adopted by the Safety & Security Council.