

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL 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: The Professional Staff of the Governmental Oversight and Accountability Committee

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BILL: CS/SB 1400

INTRODUCER: Judiciary Committee and Senator Aronberg

SUBJECT: Public Records/Estate Inventories and Accountings

DATE: April 13, 2009                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure	JU	<b>Fav/CS</b>
2.	Naf	Wilson	GO	<b>Favorable</b>
3.			RC	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill requires confidentiality for and exempts from public-records disclosure requirements:

- Estate inventories filed in an estate proceeding;
- Any inventory of the elective estate; and
- Any accounting filed in the estate proceeding.

It provides that the confidential and exempt records shall be disclosed by the custodian for inspection or copying to the personal representative, the personal representative's attorney, an interested person as prescribed by statute, or by court order upon a showing of good cause. The bill provides that the public-records exemptions are subject to repeal and review under the Open Government Sunset Review Act<sup>1</sup> and provides a statement of public necessity for the public-records exemptions.

This bill creates a public-records exemption and therefore requires a two-thirds vote of each house of the Legislature for passage.

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<sup>1</sup> Section 119.15, F.S.

This bill is a product of the Real Property, Probate, and Trust Law Section of the Florida Bar.

This bill substantially amends section 733.604, Florida Statutes.

## **II. Present Situation:**

### **Inventory of Property of an Estate**

A personal representative of an estate is required to file an inventory of the property in an estate within 60 days after issuance of letters of administration of the estate.<sup>2</sup> The inventory must be verified, and an estimated fair market value of the items at the date of death of the decedent must be included.<sup>3</sup> The inventory can only be inspected by the clerk of court, the clerk's representative, the personal representative, the personal representative's attorney, and other interested persons, unless otherwise ordered by the court for good cause.<sup>4</sup>

The personal representative is required to file a verified amended or supplementary inventory if he or she learns that property was left out of the original inventory or learns that the estimated value or description was erroneous or misleading.<sup>5</sup>

A beneficiary may make a written request for an explanation from the personal representative regarding how the inventory value was determined or, if an appraisal was obtained, for a copy of the appraisal.<sup>6</sup>

### **Accounting**

The Florida Probate Rules provide for the contents and accounting standards of a fiduciary accounting that must be verified and filed in a probate proceeding. The content includes:

1. all cash and property transactions since the date of the last accounting or, if none, from the commencement of administration, and
2. a schedule of assets at the end of the accounting period.<sup>7</sup>

There is no provision in the Florida Probate Code that requires these records to be confidential.

### **Elective Share**

The elective share in probate allows the surviving spouse of a decedent who lives in Florida to take 30 percent of the fair market value of all assets subject to the administration of the estate

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<sup>2</sup> Section 733.604, F.S.; Rule 5.340, Fla. Probate Rules. Letters of administration are pleadings and papers that are filed in a probate proceeding. They may include the petition for administration, the will, the proof of will, if applicable, and the order appointing the personal representative.

<sup>3</sup> Section 733.604(1), F.S.

<sup>4</sup> *Id.*

<sup>5</sup> Section 733.604(2), F.S.

<sup>6</sup> Section 733.604(3), F.S.

<sup>7</sup> Rule 5.346(a), Fla. Probate Rules.

except for real property not located in Florida.<sup>8</sup> The elective share is paid from the estate, if not provided for in the will, from the following sources in the following order:

- Proceeds of any term or other life insurance policy;
- Proceeds from a pension, retirement, or deferred compensation plan;
- One half of the community property as described in s. 732.2045(1)(f), F.S.;
- Property held for the benefit of the surviving spouse in a qualifying needs trust;
- Property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse;
- Property interests that would have satisfied the elective share but were disclaimed.<sup>9</sup>

If the elective share is not fully satisfied from these proceeds, the law provides that the unsatisfied balance may be apportioned among other direct recipients in the following order of priority:

- The decedent's probate estate and revocable trust;
- Recipients of property interests, other than protected charitable interests;
- Recipients of all other property interests, other than protected charitable interests, included in the elective estate;
- Recipients of protected charitable lead interests, but only to the extent and at such times that contribution is permitted without disqualifying the charitable interest in that property for a deduction under the United States gift tax laws.<sup>10</sup>

### **Florida Public Records Law**

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.<sup>11</sup> In 1992, Floridians adopted an amendment, article I, section 24, to the State Constitution that raised the statutory right of access to public records to a constitutional level.

The Public Records Act<sup>12</sup> specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency<sup>13</sup> records are available for public inspection.<sup>14</sup> Section 119.011(12), F.S., defines *public records* very broadly to include “all documents, ... tapes, photographs, films, sounds recordings, ... made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”

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<sup>8</sup> Section 732.2065, F.S.

<sup>9</sup> Section 732.2075(1), F.S.

<sup>10</sup> Section 732.2075(2), F.S.

<sup>11</sup> Sections 1390, 1391, F.S. (Rev. 1892).

<sup>12</sup> Chapter 119, F.S.

<sup>13</sup> Section 119.011(2), F.S., defines *agency* as “any state, county, ... or municipal officer, department, ... or other separate unit of government created or established by law ... and any other public or private agency, person, ... acting on behalf of any public agency.”

<sup>14</sup> *Tribune Co. v. Canella*, 458 So. 2d 1075, 1077 (Fla. 1984).

Only the Legislature is authorized to create exemptions to open government requirements. Exemptions must be created by general law, and the law must specifically state the public necessity justifying the exemption.<sup>15</sup> Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>16</sup> A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>17</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>18</sup> provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.<sup>19</sup> An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.<sup>20</sup> An exemption meets the statutory criteria if it:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
2. Protects information of a sensitive personal nature concerning individuals, the release of which ... would be defamatory ... or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which ... would injure the affected entity in the marketplace.<sup>21</sup>

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.<sup>22</sup>

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<sup>15</sup> FLA. CONST. art. I, s. 24(c).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Section 119.15, F.S.

<sup>19</sup> Section 119.15(6)(b), F.S.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Section 119.15(6)(a), F.S.

### **Retroactive Application of Public-Records Exemptions**

A statute affecting the substantive right to access of public records is presumptively prospective.<sup>23</sup> If the Legislature is “clear in its intent” to do so, however, the exemption may be applied retroactively.<sup>24</sup>

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

The bill provides that it is a public necessity to exempt from public-records requirements all inventories of property of estates of decedents, including amended and supplementary inventories, and all inventories of elective estates of surviving spouses. It also provides that, in order to preserve the privacy of information, all accountings of an estate should be exempt from public-records requirements.

According to the Real Property, Probate, and Trust Law Section of the Florida Bar, when the law pertaining to the elective share was significantly revised in 1999, no consideration was given to the need to apply the protection of confidentiality to this new type of estate inventory in s. 733.604, F.S. Further, the RPPTL section states that it is necessary to modify existing law to clarify that elective share inventories be afforded the same privacy exemptions as estate inventories because the elective estate inventory will contain much more financial information regarding the decedent than the estate inventory.<sup>25</sup>

The RPPTL section also states that accountings filed in an estate proceeding are not currently protected from public inspection, which is inconsistent with the policy behind preventing public inspection of estate inventories, because an accounting contains even more financial information about the decedent and the estate than an estate inventory.<sup>26</sup>

The bill amends s. 733.604, F.S., to make confidential and to exempt from public-records disclosure requirements:

- Estate inventories, whether initial, amended, or supplementary, filed in an estate proceeding;
- Any inventory, whether initial, amended, or supplementary, of the elective estate; and
- Any accounting, whether interim, final, amended, or supplementary, filed in the estate proceeding.

It provides that the confidential and exempt records shall be disclosed by the custodian for inspection or copying to the personal representative, the personal representative’s attorney, an interested person as prescribed by statute, or by court order upon a showing of good cause. It provides that these exemptions apply to any inventory or accounting filed before, on, or after July 1, 2009. The bill provides that it is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2014, unless reenacted by the Legislature.

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<sup>23</sup> *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001).

<sup>24</sup> *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388, 396 (Fla. 5th DCA 2002).

<sup>25</sup> Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Revisions to Florida Statute Section 733.604* (2009) (on file with the Senate Committee on Judiciary).

<sup>26</sup> *Id.*

This bill provides an effective date of July 1, 2009, if Senate Bill 1396 or similar legislation is adopted in the same legislative session or an extension thereof and becomes law. Senate Bill 1396 improves and clarifies current Florida law pertaining to the administration of estates of decedents and the Florida Uniform Disclaimer of Property Interests Act.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill creates public-records exemptions, which under Article I, s. 24(c) of the Florida Constitution requires passage by a two-thirds vote in each house. The bill also includes a statement of public necessity as required under Article I, s. 24(c) of the Florida Constitution for any newly created public-records or public-meetings exemptions.

The bill makes clear that the Legislature intends the exemption to apply retroactively.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There may be costs incurred by the clerk of the probate court for maintaining public-records exemptions for the elective share inventories and estate accountings.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on March 11, 2009:**

The committee substitute removes an incorrect reference in the probate code. It provides a specific effective date for the exemptions described in the bill and inserts the correct reference to a bill number for the effective date of the bill.

- B. **Amendments:**

None.