

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 599

Administration of Estates

SPONSOR(S): Hukill

TIED BILLS: HB 631

IDEN./SIM. BILLS: SB 1396

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	8 Y, 0 N	DeZego	De La Paz
2)	Governmental Affairs Policy Committee			
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

SUMMARY ANALYSIS

This bill makes multiple changes to the probate code and the administration of estates and clarifies existing law. This bill provides, in part, the following:

- The definition of a "minor," which is identical to the definition in the Florida Guardianship Code;
- A four year statute of limitations does not apply to actions to determine heirs in a probate proceeding;
- A transfer in satisfaction of the elective share is an irrevocable transfer by the decedent during his or her life to an elective share trust;
- The Uniform Disposition of Community Property Rights at Death Act's exclusion for property is extended to property covered by similar provisions in other states;
- The unsatisfied balance of the spouse's elective share right is to be satisfied from the actual assets in nonqualifying trusts described in s. 732.2075(1), F.S.;
- The responsibility for the satisfaction of the remaining elective share balance is to be apportioned among the direct recipients in each class with each class only responsible to the extent that the assets in the previous class did not satisfy the remaining elective share balance;
- The court's ability to assess fees and costs to a surviving spouse who withdraws an election is removed;
- The court may assess fees and costs if it determines that a spouse made or pursued an election in bad faith;
- The amount of a decedent's household property exempt from creditor's claims is increased from \$10,000 to \$20,000;
- The personal automobile limitation on exempt property is changed to a "motor vehicle" limitation based on a gross weight limit;
- The motor vehicle exemption is limited to two vehicles;
- In instances where the petitioner of a petition for summary administration is also the trustee of a trust that is a beneficiary of the decedent's estate, the beneficiaries of the trust must be made aware of the petition for summary administration;
- When a disclaimer of property has power to direct the beneficial enjoyment of the disclaimed property, he or she must be deemed to have disclaimed that power unless specifically provided to the contrary; and
- A person is insolvent for purposes of ch. 739, F.S., when the sum of a person's debts is greater than his or her assets at fair valuation and the person is generally not paying his or her debts as they become due.

This bill does not appear to have an impact on state or local government revenues or expenditures.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

Probate is the legal process for determining the validity or invalidity of a will, and generally provides for payment of the bills of the deceased, and distribution of the deceased's property to heirs. In general, the assets of the deceased are used first to pay the cost of the probate proceeding, then are used to pay the outstanding debts of the deceased, and the remainder is paid to the heirs. If the deceased left a valid will, the estate is "testate", and the assets are distributed according to the will. If the deceased did not leave a valid will, the estate is "intestate," and the assets are distributed according to statute. There are two significant exceptions to these general rules: exempt property and homestead property transfer to certain surviving dependents before such property is subject to being sold to pay creditors; and the elective share provisions may provide a different inheritance for a surviving spouse than the spouse would otherwise receive by operation of the will and of probate law.

##### **Definitions**

###### *Current Law*

Currently, the Florida Probate Code does not provide a definition of a "minor" despite its use throughout the code. Section 731.201, F.S., provides that a person is incompetent if he or she is a minor or was adjudicated incompetent.

###### *Proposed Changes*

This bill defines a minor as a person less than 18 years of age whose disabilities have not been removed because of marriage or for another reason. This definition is identical to the definition in the Florida Guardianship Code.<sup>1</sup> In addition, this bill removes the definition of an "incompetent" person and replaces it with "incapacitated," which is defined as a person who lacks the capacity to manage at least some of his or her property or meet at least some of his or her essential health and safety requirements. This bill specifies that a minor is to be treated as incapacitated. Therefore, a person may be incapacitated without being adjudicated incompetent.

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<sup>1</sup> Section 744.102(13), F.S

## Determination of Paternity

### *Current Law*

Florida law provides that for the purpose of intestate succession where adoption is not involved, a person born out of wedlock is a descendant of his or her father.<sup>2</sup> In addition, a person born out of wedlock is one of the natural kindred of all members of the father's family if:

- The natural parents participated in a marriage ceremony before or after the birth of the child, regardless of whether or not the marriage is void;
- The paternity of the father is established before or after the death of the father; or
- The paternity of the father is acknowledged in writing by the father.

Section 95.11(3)(b), F.S., provides that an action for the recovery of real property, which relates to the determination of paternity, must be brought within four years after a child reaches majority. The Florida Supreme Court held in *Estate of Smith* that this four-year-statute of limitation applies in actions to determine paternity under s. 732.108(2), F.S.<sup>3</sup>

### *Proposed Changes*

This bill overrules the holding in *Estate v. Smith* and provides that ch. 95, F.S., does not apply in determining heirs in a probate proceeding. Therefore, this bill allows for a determination of paternity to be made in a probate proceeding for the purpose of proving heirship, even if it is more than four years after the date the child reaches majority. This change is limited to intestate succession.

## Elective Share

The surviving spouse of a person who dies domiciled in Florida has the right to elect to take a share of the estate of the decedent, known as the elective share,<sup>4</sup> instead of the share of the estate provided in the will or provided in the laws of intestacy. The elective share is for the express purpose of caring for the surviving spouse<sup>5</sup> and is statutorily set at 30% of the elective estate.<sup>6</sup> The elective share is reduced by the value of any property passing to the spouse in the decedent's will, under intestacy, or as a pretermitted (not mentioned in the will) spouse. The elective share is in addition to the spouse's right to exempt property, a family allowance, and homestead.

## Inter Vivos Transfer

### *Current Law*

An elective share trust is a trust under which<sup>7</sup>:

- The surviving spouse is entitled for life to the use of the property or to all of the income payable at least as often as annually;
- The surviving spouse has the right under the terms of the trust or state law to require the trustee either to make the property productive or to convert it within a reasonable time; and
- During the spouse's life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.

Florida law currently provides that a transfer in satisfaction of an elective share is an irrevocable transfer by the decedent to an elective share trust.<sup>8</sup>

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<sup>2</sup> Section 732.108(2), F.S.

<sup>3</sup> *Estate of Smith*, 885 So. 2d 1206 (1996).

<sup>4</sup> Section 732.201, F.S.

<sup>5</sup> *In re Anderson's Estate*, 394 So.2d 1146 (Fla. 4th DCA 1981).

<sup>6</sup> Section 732.2065, F.S.

<sup>7</sup> Section 732.2025(2), F.S.

## *Proposed Changes*

The bill clarifies that a transfer in satisfaction of the elective share is an irrevocable transfer by the decedent *during his or her life* (an inter vivos transfer) to an elective share trust.

## Community Property

### *Current Law*

The Uniform Disposition of Community Property Rights at Death Act, which is codified at ss.732.216-732.228, F.S., applies to property that was acquired as community property under the laws of another jurisdiction or is traceable to money which was community property.<sup>9</sup> A surviving spouse is entitled to one-half of community property consisting of personal property wherever it is located and real property within Florida.<sup>10</sup> Florida law provides that the decedent's one-half of property is excluded from the elective estate for purposes of calculating the surviving spouse's elective share.<sup>11</sup>

### *Proposed Changes*

This bill extends the exclusion for property under the Uniform Disposition of Community Property Rights at Death Act to property covered by similar provisions in other states.

## Satisfaction of the Elective Share

### *Current Law*

Unless a decedent's will provides to the contrary, in a trust referred to in the decedent's will, the following are applied first to satisfy the elective share<sup>12</sup>:

- To the extent paid to or for the benefit of the surviving spouse, the proceeds of any term or other policy of insurance on the decedent's life if, at the time of decedent's death, the policy was owned by any person other than the surviving spouse.
- To the extent paid to or for the benefit of the surviving spouse, amounts payable under any plan or arrangement described in s. 732.2035(7).
- To the extent paid to or for the benefit of the surviving spouse, the decedent's one-half of any property described in s. 732.2045(1)(f).
- Property held for the benefit of the surviving spouse in a qualifying special needs trust.
- Property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse, including interests that are contingent upon making the election, but only to the extent that such contingent interests do not diminish other property interests that would be applied to satisfy the elective share in the absence of the contingent interests.
- Property interests that would have satisfied the elective share under any preceding paragraph of this subsection but were disclaimed.

If the elective share is not fully satisfied after the above, then the balance is apportioned among the direct recipients of the remaining elective estate in the following order of priority:

- The decedent's probate estate and revocable trusts.
- Recipients of property interests, other than protected charitable interests, included in the elective estate under s. 732.2035(2), (3), or (6) and, to the extent the decedent had at the time

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<sup>8</sup> Section 732.2025(10), F.S.

<sup>9</sup> Section 732.217, F.S.

<sup>10</sup> Section 732.2045, F.S.

<sup>11</sup> Section 732.219, F.S.

<sup>12</sup> Section 732.2075, F.S.

of death the power to designate the recipient of the property, property interests, other than protected charitable interests, included under s. 732.2035(5) and (7).

- 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.

If a surviving spouse has an interest in a trust which does not meet the definition of either an elective share trust or a qualifying special needs trust,<sup>13</sup> then the transfer tax value of the spouse's interest, not to exceed 50% of the trust, is applied in satisfaction of the elective share amount.<sup>14</sup> However, if the bulk of the estate passes to a nonqualifying trust and the spouse has only a nominal interest in the trust, then the elective share right may go unsatisfied.

### *Proposed Changes*

This bill changes the order of what is supplied first to satisfy the elective share. This bill provides that the following are applied first to satisfy the elective share:

- Property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse, including interests that are contingent upon making the election, but only to the extent that such contingent interests do not diminish other property interests that would be applied to satisfy the elective share in the absence of the contingent interests.
- To the extent paid to or for the benefit of the surviving spouse, amounts payable under any plan or arrangement described in s. 732.2035(7).
- To the extent paid to or for the benefit of the surviving spouse, the decedent's one-half of any property described in s. 732.2045(1)(f).
- To the extent paid to or for the benefit of the surviving spouse, the proceeds of any term or other policy of insurance on the decedent's life if, at the time of decedent's death, the policy was owned by any person other than the surviving spouse.
- Property held for the benefit of the surviving spouse in a qualifying special needs trust.
- Property interests that would have satisfied the elective share under any preceding paragraph of this subsection but were disclaimed.

In addition, this bill clarifies existing law to provide that the responsibility for the satisfaction of the remaining elective share balance should be apportioned among the direct recipients in each class with each class only responsible to the extent that the assets in the previous class did not satisfy the remaining elective share balance.

This bill provides that the unsatisfied balance of the spouse's elective share right is to be satisfied from the actual assets in nonqualifying trusts described in s. 732.2075(1), F.S., and provides that the spouse's interest in any remaining assets in the nonqualifying trust is to be adjusted to reflect the loss in value. This bill provides that if there is more than one trust to which this section could apply, unless provided otherwise in the decedent's will, the unsatisfied balance must be apportioned pro rata to all such trusts in proportion to the value of the surviving spouse's beneficial interests in the trusts.

This bill provides that if the elective share is still not fully satisfied after the application of all of the above, then any remaining unsatisfied balance must be satisfied from direct recipients of protected charitable lead interests as long as the contribution does not disqualify the charitable trust from a deduction under the United States gift tax law.

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<sup>13</sup> A qualifying special needs trust is a trust established for a disabled surviving spouse.

<sup>14</sup> Section 732.2075(1), F.S.

## Assessment of Fees and Costs

### *Current Law*

Current law provides that a surviving spouse may withdraw an election to take the elective share no more than eight months after the decedent's death.<sup>15</sup> A court may assess attorney's fees and costs against the surviving spouse or the surviving spouse's estate for the withdrawal of an election.

### *Proposed Changes*

This bill removes the court's authority to assess fees and costs to a surviving spouse who withdraws an election. Instead, this bill provides the court the authority to assess fees and costs if it determines that a spouse made or pursued an election in bad faith.

## Exempt Property

### *Current Law*

Section 732.402, F.S., allows a decedent to pass certain assets free from the claims of the decedent's creditors to his or her surviving spouse or children. Those assets consist of:

- 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 the death;
- All automobiles held in the decedent's name regularly used by the decedent or members of the decedent's immediate family as their personal automobiles;
- Stanley G. Tate Florida Prepaid College Program contracts purchased and Florida College Savings agreements;
- All benefits paid pursuant to s. 112.1815, F.S., which pertains to benefits paid to first responders, such as law enforcement officers, firefighters and paramedics.

### *Proposed Changes*

This bill increases the amount of a decedent's household furniture, furnishings and appliances, which are exempt from creditor's claims, from \$10,000 to \$20,000. This amount was increased to \$10,000 from \$5,000 in 1981.<sup>16</sup> In addition, this bill changes "automobiles" to "motor vehicles," and limits the number of motor vehicles exempt under this section to two motor vehicles. Therefore, motorcycles and sports utility vehicles may be exempted under this section. However, this bill provides a gross vehicle weight limit of no more than 15,000 pounds, which excludes vehicles such as motor homes and commercial trucks from exempt property.

In addition, this bill provides that all qualified tuition programs authorized by s. 529 of the Internal Revenue Code of 1986, including but not limited to the Florida Prepaid College Trust Fund, is exempt property. This amendment is consistent with the 2005 revision of s. 222.22(1), F.S., which expanded the coverage of that provision to all qualified tuition programs authorized by s. 529 of the Internal Revenue Code of 1986.

## Florida Trust Code

This bill amends s. 733.602, F.S., to remove an inaccurate cross reference to part VII of ch. 736 located in the Florida Trust Code.

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<sup>15</sup> Section 732.2135, F.S.

<sup>16</sup> See ch. 81-238, Laws of Florida

## Summary Administration

### *Current Law*

There are two types of probate administration in Florida: formal administration and summary administration. Summary administration is available when:<sup>17</sup>

- A decedent's will does not direct administration according to ch. 733; and
- The value of the entire estate, less the value of property exempt from the claims of creditors, does not exceed \$75,000 or the decedent has been dead for more than two years.

A petition for summary administration of an estate may be filed by any beneficiary or personal representative nominated in the decedent's will. The petition must be signed and verified by any surviving spouse and any beneficiaries. Current law does not specifically address whether s. 731.303, F.S., which discusses the notice and representation of trusts, applies in connection with summary administration proceedings where no personal representative is appointed in a summary administration proceeding.

### *Proposed Changes*

This bill provides that a beneficiary who will receive the full distributive share under the proposed distribution does not have to join with other beneficiaries in the petition for summary administration. Rather, the other beneficiaries must be served formal notice along with the petition. Furthermore, this bill clarifies that in instances where the petitioner is also the trustee, the beneficiaries of the trust must be made aware of the petition for summary administration. This bill provides that if a trustee of a trust that is a beneficiary of the estate is also a petitioner, then each beneficiary of the trust must be served formal notice along with the petition. However, formal notice is not required if the beneficiaries of the trust are joined in the petition for summary administration or consent to the petition.

## Power to Disclaim

### *Current Law*

Chapter 739 of the Florida Statutes is known as the Florida Uniform Disclaimer of Property Interests Act. A disclaimer is the refusal to accept an interest in or power over property.<sup>18</sup> A person may not disclaim interest in property if he or she is insolvent when the disclaimer becomes irrevocable.<sup>19</sup> A fiduciary,<sup>20</sup> who has court approval to do so, may disclaim in whole or in part any interest in or power over property. Without court approval, a fiduciary may disclaim in whole or in part any interest in or power over property if the instrument which creates the fiduciary relationship grants the fiduciary the right to do so.<sup>21</sup>

Section 2518 of the Internal Revenue Code permits the beneficiary of an estate or trust to make a "qualified disclaimer,"<sup>22</sup> in which case the disclaimant will be treated, for estate and gift tax purposes, as though he or she had never received any interest in the estate or trust.<sup>23</sup> Under federal tax law, a surviving spouse may disclaim property into a trust. However, in order to qualify as a qualified disclaimer and to avoid any taxable general power of appointment, the disclaiming spouse cannot retain any power to direct the beneficial enjoyment of the disclaimed property, unless the power is limited by an ascertainable standard.

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<sup>17</sup> Section 735.201, F.S.

<sup>18</sup> Section 739.102(5), F.S.

<sup>19</sup> Section 739.402(2), F.S.

<sup>20</sup> A fiduciary in this context is a person who is under a duty to act for the benefit of the other on matters within the scope of the relationship. Black's Law Dictionary, pg. 282 (2nd pocket edition, 2001).

<sup>21</sup> Section 739.104(2), F.S.

<sup>22</sup> A qualified disclaimer is an irrevocable and unqualified refusal by a person to accept an interest in the property.

<sup>23</sup> Treas. Reg. § 25.2518-1(b)

## *Proposed Changes*

This bill creates s. 739.401(4), F.S., which provides that when a disclaimer of property has power to direct the beneficial enjoyment of the disclaimed property, the disclaimant must be deemed to have disclaimed that power unless the disclaimer specifically provides to the contrary or the power is limited by an ascertainable standard.<sup>24</sup> Therefore, a person may not inadvertently disqualify a disclaimer by retaining the power to direct the beneficial enjoyment of the property.

In addition, this bill provides that a fiduciary does not need court approval or a specific grant from the instrument which created the fiduciary duty to disclaim a power arising under s. 739.401(4), F.S. A disclaimer under this section only binds the disclaiming fiduciary.

This bill clarifies that a person is insolvent for purposes of ch. 739, F.S., when the sum of a person's debts is greater than his or her assets at fair valuation and the person is generally not paying his or her debts as they become due. This bill provides that assets under this subsection do not include:

- Property to the extent it is encumbered by a valid lien;
- Property to the extent it is generally exempt under nonbankruptcy law; or
- An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

### B. SECTION DIRECTORY:

Section 1 amends s. 731.201, F.S., relating to definitions regarding estates and trusts.

Section 2 amends s. 732.108, F.S., relating to adopted persons and persons born out of wedlock.

Section 3 amends s. 732.2025, F.S., relating to definitions regarding intestate succession and wills.

Section 4 amends s. 723.2045, F.S., relating to exclusions in interstate succession and will.

Section 5 amends s. 732.2075, F.S., relating to sources from which elective shares payable.

Section 6 amends s. 732.2085, F.S., relating to liability of direct recipients and beneficiaries.

Section 7 amends s. 732.2135, F.S., relating to the time of election, extensions and withdrawal.

Section 8 amends s. 732.402, F.S., relating to exempt property.

Section 9 amends s. 733.201, F.S., relating to proof of wills.

Section 10 amends s. 733.504, F.S., relating to removal of personal representation.

Section 11 amends s. 733.602, F.S., relating to the general duties of the administration of estates.

Section 12 amends s. 735.203, F.S., relating to a petition for summary administration.

Section 13 amends s. 739.102, F.S., relating to definitions regarding the Florida Uniform Disclaimer of Property Interests Act.

Section 14 amends s. 739.104, F.S., relating to the power to disclaim.

Section 15 amends s. 739.201, F.S., relating to the disclaimer of interest in property.

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<sup>24</sup> Section 736.0103, F.S., provides that "ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of s. 2041(b)(1)(A) or s. 2514(c)(1) of the Internal Revenue Code of 1986, as amended.



Section 16 amends s. 739.207, F.S., relating to the disclaimer of power held in fiduciary capacity.

Section 17 amends s. 739.402, F.S., relating to when a disclaimer is barred or limited.

Section 18 amends s. 739.501, F.S., relating to tax qualified disclaimer.

Section 19 amends s. 660.417, F.S., relating to investment of fiduciary funds in investment instruments.

Section 20 amends s. 736.0802, F.S., relating to the duty of loyalty in trusts.

Section 21 amends s. 895.02, F.S., relating to definitions regarding offenses concerning racketeering and illegal debts.

Section 22 provides an effective date of October 1, 2009.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None. See Fiscal Comments.

#### **2. Expenditures:**

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

This bill increases the amount of exemptions from \$10,000 to \$20,000 for a decedent's household furniture, furnishings, and appliances. Therefore, individuals may receive \$10,000 more from a decedent's estate. Creditors will likely see a \$10,000 decrease in revenues from a decedent's estate.

### **D. FISCAL COMMENTS:**

According to the Office of State Courts Administrator, the change in the court's ability to assess fees and costs to a surviving spouse for withdrawing an election under this bill should not impact the court's workload.

## **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 raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

N/A