

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.)

Prepared By: The Professional Staff of the Budget Subcommittee on General Government Appropriations

BILL: CS/CS/SB 1146

INTRODUCER: Budget Subcommittee on General Government Appropriations; Judiciary Committee and Senator Simmons

SUBJECT: Effect of Dissolution or Annulment of Marriage on Certain Designations

DATE: February 28, 2012 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	Fav/CS
2.	Betta	DeLoach	BGA	Fav/CS
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| 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:

The bill generally nullifies upon divorce or annulment the designation of a spouse as a beneficiary of nonprobate assets such as life insurance policies, individual retirement accounts, and payable on death accounts. State-administered retirement plans are exempt from the bill. If the provisions of the bill apply, an asset will pass as if the former spouse predeceased the decedent.

The bill also specifies criteria for a payor of a nonprobate asset to use in identifying the appropriate beneficiary. The bill specifically provides that the payor is not liable in some circumstances for transferring an asset to the beneficiary identified through the bill's criteria.

This bill creates section 732.703, Florida Statutes.

II. Present Situation:

Disposition of Nonprobate Assets

Chapters 731 to 735, F.S., are known as the “Florida Probate Code.”¹ Substantive rights regarding probate are covered in the probate code and procedural matters are governed by probate rules adopted by the Florida Supreme Court.

Chapter 732, F.S., governs substantive issues relating to wills. A provision of a will executed before the dissolution or annulment of a marriage which provides for a former spouse is void.² A court will interpret the will as if the former spouse “had died at the time of the dissolution, divorce, or annulment of the marriage, unless the will or the dissolution or divorce judgment expressly provides otherwise.”³ A similar provision exists for trusts. If a revocable trust is created by a husband or wife as settlor before the entry of a judgment for a divorce or annulment of a marriage, then any provision of the trust that affects the divorced spouse is void unless the trust provides otherwise.⁴

In contrast, nonprobate assets⁵ typically are transferred by the designation of a beneficiary as provided in the contract.⁶ If an individual designates his or her spouse as beneficiary on the individual’s life insurance policy or other nonprobate asset, divorces the spouse, and fails to modify the beneficiary designated on the policy, the former spouse will receive the policy’s proceeds upon the individual’s death. Nonprobate assets are widely used as a tool for estate planning.⁷

Litigation has ensued to determine the disposition of nonprobate assets in instances where an individual who owns nonprobate assets, divorced, and later failed to remove the former spouse as beneficiary for the assets.⁸ In that litigation, the Florida Supreme Court held that a former spouse as named beneficiary was entitled to term life insurance proceeds despite a general release in a marital settlement agreement.⁹ The Court reasoned that the determination of who is entitled to the assets depends on the plain language in the insurance contract designating a beneficiary when a marital settlement agreement fails to specifically remove the former spouse.¹⁰

¹ Section 731.005, F.S.

² Section 732.507(2), F.S. *See also*, Henry P. Trawick, Jr., *Trawick’s Redfearn Wills and Administration in Florida*, s. 3:10 (2009-2010 ed.).

³ Section 732.507(2), F.S.

⁴ Section 736.1105, F.S.

⁵ “Nonprobate asset” means “[p]roperty that passes to a named beneficiary upon the owner’s death according to the terms of some contract or arrangement other than a will. Such an asset is not a part of the probate estate and is not ordinarily subject to the probate court’s jurisdiction (and fees), though it is part of the taxable estate. Examples include life-insurance contracts, joint property arrangements with right of survivorship, pay-on-death accounts, and inter vivos trusts.” BLACK’S LAW DICTIONARY (9th ed. 2009).

⁶ *Id.*

⁷ *See* Suzanne Soliman, *A Fair Presumption: Why Florida Needs a Divorce Revocation Statute for Beneficiary-Designated Nonprobate Assets*, 36 STETSON L. REV. 397, 397 (Winter 2007).

⁸ Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death* (on file with the Senate Committee on Judiciary).

⁹ *Cooper v. Muccitelli*, 682 So. 2d 77, 79 (Fla. 1996).

¹⁰ *Id.*

In a subsequent case, the Florida Supreme Court explained that:

absent the marital settlement agreement providing who is or is not to receive the death benefits or specifying who is to be the beneficiary, courts should look no further than the named beneficiary in the separate document of the policy, plan, or account. General language in a marital settlement agreement, such as language stating who is to receive ownership, is not specific enough to override the plain language of the beneficiary designation in the separate document. The spouse, who owns the policy, plan, or account following the dissolution of marriage, is otherwise free to name any individual as the beneficiary; however, if the spouse does not change the beneficiary, the beneficiary designation in the separate document controls.¹¹

III. Effect of Proposed Changes:

Section 1. (Effect of Dissolution or Annulment of Marriage on Designation of Beneficiary for Certain Nonprobate Assets)

The bill voids the designation of a former spouse as a beneficiary of an interest in an asset that will be transferred or paid upon the death of the decedent if:

- The decedent's marriage was judicially dissolved or declared invalid before the decedent's death; and
- The designation was made before the dissolution or order invalidating the marriage.

The decedent's interest in the asset must pass as if the decedent's former spouse predeceased the decedent. The nonprobate assets covered by the bill include:

- a life insurance policy, qualified annuity, or other similar tax-deferred contract held within an employee benefit plan;
- an employee benefit plan;
- an individual retirement account;
- a payable-on-death account;
- a security or other account registered in a transfer-on-death form; and
- a life insurance policy, annuity or other similar contract that is not held within an employee benefit plan or tax-qualified retirement account.

However, the bill does not void a beneficiary designation:

- to the extent federal law provides otherwise;
- if the governing instrument as defined in the bill¹² expressly provides that the interest will be payable to the designated former spouse after the order of dissolution or order declaring the

¹¹ *Crawford v. Barker*, 64 So. 3d 1246, 1248 (Fla. 2011).

¹² "Governing instrument" is defined in the bill to mean "any writing or contract governing the disposition of all or part of an asset upon the death of the decedent."

marriage invalid and the instrument expressly provides that benefits will be payable to the decedent's former spouse;

- to the extent the disposition of the assets are governed by a will or trust;
- if a court order required the decedent to acquire or maintain the asset for the benefit of the former spouse or children of the marriage;
- if under terms of the order of dissolution or order declaring the marriage invalid, the decedent did not have the ability to unilaterally terminate or change the beneficiary or pay-on-death designation;
- if the designation of the decedent's former spouse as beneficiary is irrevocable under applicable law;
- if the contract or agreement is governed by the laws of another state;
- to an asset held in two or more names as to which the death of one co-owner vests ownership of the asset in the surviving co-owner or co-owners; or
- if the decedent remarries the person whose interest would otherwise have been revoked as a former spouse under the bill and the decedent and that person are married to one another at the time of the decedent's death.
- for state-administered retirement plans under chapter 121, Florida Statutes.

Payment Procedures

The bill outlines procedures and requirements for entities making payment of the decedent's interest in the following nonprobate assets: a life insurance policy, qualified annuity, or other similar tax-deferred contract held within an employee benefit plan; an employee benefit plan; or an individual retirement account.

If the governing instrument does not explicitly specify the relationship between the beneficiary designated in the instrument and the decedent, or if the governing instrument explicitly provides that the beneficiary is not the decedent's spouse, the payor is not liable for making any payment or transferring any interest in the account to the beneficiary.

If the governing instrument specifies the *primary beneficiary as the spouse of the decedent*, the payor must examine the death certificate. If the death certificate provides that the decedent was married to the named beneficiary at the time of death, the payor may pay out the benefits to the named beneficiary. If the death certificate states that the decedent was not married, or was married to another individual other than the person specified on the account as the spouse, the payor is not liable for paying or transferring the interest in the asset to the secondary beneficiary under the governing instrument.

If the death certificate is silent as to the marital status of the decedent, the bill provides for the use of two form affidavits. One affidavit may be executed by an individual alleging to be the surviving spouse of the decedent. If the alleged surviving spouse executes the affidavit, certifying that he or she is the surviving spouse of the decedent and that the decedent was married to him or her at the time of the decedent's death, the payor is not liable for paying the account to such individual. The second affidavit may be executed by a secondary beneficiary who must certify that the primary beneficiary was not married to the decedent at the time of the decedent's death. The payor may also pay out the interest to the secondary beneficiary upon receipt of a properly executed affidavit.

Payors' Liability Extinguished

The bill provides that in the case of pay-on-death accounts, securities or other accounts registered in transfer-on-death form, and life insurance policies, annuities or other similar contracts not held within an employee benefit plan or a tax-qualified retirement account, the payor is not liable for making any payment on account of, or transferring any interest in, such assets to any beneficiary.¹³

A payor's immunity for making a payment in accordance with the criteria in the bill applies notwithstanding the payor's knowledge that the person to whom the asset is transferred is different from the person who would own the interest due to the dissolution of the decedent's marriage or declaration of the marriage's validity before the decedent's death. As such, a secondary beneficiary will have a cause of action against the former spouse who receives the payment or transfer of the assets described in the bill if the beneficiary designations were made void upon divorce or annulment.¹⁴

The bill does not affect the ownership of an interest in an asset as between the former spouse and any other person entitled to such interest, the rights of any purchaser for value of any such interest, the rights of any creditor of the former spouse or any other person entitled to such interest, or the rights and duties of any insurance company, financial institution, trustee, administrator, or other third party.

The provisions of the bill, relating to beneficiary designations, apply to all designations made by or on behalf of decedents dying on or after July 1, 2012, regardless of when the designation was made.

Section 2. The bill provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹³ This bill is not intended to impose any additional due diligence requirements, requirements to review death certificates, on the payors of the assets described in s. 732.703(6), F.S. Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death* (on file with the Senate Committee on Judiciary).

¹⁴ "The primary purpose of [s. 732.703, F.S.] is to create the basis for a cause of action for accounts that are paid out to former spouses as opposed to intended beneficiaries." Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death* (on file with the Senate Committee on Judiciary).

C. Trust Funds Restrictions:

None.

V. **Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Companies that administer the nonprobate assets covered by the bill may incur additional costs to implement the bill. Such costs are difficult to estimate.

C. Government Sector Impact:

None.

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/CS by Budget Subcommittee on General Government Appropriations on February 28, 2012:

The committee substitute exempts state-administered retirement plans under chapter 121, Florida Statutes.

CS by Judiciary on January 25, 2012:

The committee substitute deletes sections 2 and 3 of the original bill. Those sections would have terminated upon divorce or annulment the authority of a former spouse to serve as a health care surrogate or to serve as a surrogate for the purposes of a living will. Current law appears to address this circumstance in s. 765.104(2), F.S., which states, “Unless otherwise provided in the advance directive or in an order of dissolution or annulment of marriage, the dissolution or annulment of marriage of the principal revokes the designation of the principal’s former spouse as a surrogate.”

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
