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 Judiciary Committee

BILL:	SB 988
INTRODUCER:	Senator Joyner
SUBJECT:	Probate
DATE:	January 18, 2012
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

The bill revises the effective date of the 2011 amendments to s. 732.102, F.S., so that the changes to that section apply only to the estates of decedents dying on or after October 1, 2011. Section 732.102, F.S., was amended in 2011 to revise the share a decedent's spouse receives as part of an intestate estate under certain circumstances.

Effective July 1, 2012, and applicable to estates of persons dying on or after July 1, 2012, the bill:

- amends the definition of "protected homestead" in s. 733.201, F.S., to clarify that real property owned in joint tenancy with right of survivorship is not protected homestead.
- amends s. 732.401(2)(c), F.S., to revise the time under which an attorney in fact or guardian for an incapacitated spouse must file a petition for authority to make an election to take an undivided one-half interest as tenant in common in the decedent's homestead.
- creates s. 732.1081, F.S., to amend the probate code to bar inheritance through intestate succession by a parent from a child in cases when the natural or adoptive parent's parental rights were terminated pursuant to ch. 39, F.S., prior to the death of the child. In such cases, the natural or adoptive parent must be treated as if the parent predeceased the child.

This bill creates section 732.1081, Florida Statutes, and one undesignated section of law.

This bill amends sections 731.201, 732.401, Florida Statutes.

II. Present Situation:

Devise, Descent, and Disclaimer of Homestead Property

The Florida Constitution imposes restrictions on the devise of homestead property, which are designed to protect surviving spouses and minor children. Specifically, article X, section 4 of the Florida Constitution, provides, in part that:

> The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there is no minor child.

Additionally, s. 732.4015, F.S., provides that "the homestead shall not be subject to devise[1] if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children." If the owner of homestead real property fails to make a devise of the homestead or attempts to devise homestead in a manner not permitted by the Florida Constitution, ownership descends as outlined in s. 732.401, F.S. Under s. 732.401, F.S., "the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate[2] in the homestead, with a vested remainder[3] to the descendants in being at the time of the decedent's death per stirpes.[4] Section 732.401, F.S., was amended in 2010 to make it clear that property owned by a decedent in joint tenancy with right of survivorship[5] is not subject to restrictions on devise.[6]

Prior to the amendments to s. 732.401, F.S., in 2010, the section provided that restrictions on the devise of homestead "[do] not apply to property that the decedent and the surviving spouse owned as tenants by the entirety."[7]

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[1] Section 731.201(10), F.S., defines "devise" when used as a noun to mean "a testamentary disposition of real or personal property." When used as a verb, the term means "to dispose of real or personal property by will or trust." Section 732.4015, F.S., describes, "devise" to include a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead."

[2] "The *life estate* is a freehold estate whose duration is measured by the lives of one or more specified persons."John G. Sprankling, *Understanding Property Law*, 100 (2000) (citing the RESTATEMENT OF PROPERTY § 18 (1936)).

[3] "A vested remainder is a remainder that is created in a living, ascertainable person and (b) not subject to any condition precedent (except the natural termination of the prior estate)." *Id.* at 170-171.

[4] Per stirpes means "[p]roportionally divided between beneficiaries according to their deceased ancestor's share." BLACK'S LAW DICTIONARY 1164 (7th ed. 1999).

[5] "A joint tenancy is one in which the tenants have one and the same interest." The interest must accrue by one and the same instrument and must commence at one and the same time. The property must be held by one and the same undivided possession. A joint tenancy must be held by two or more persons. At common law, it had the incident of survivorship between or among joint tenants. This has been abolished by statute in Florida, but the statute permits the creation of a joint tenancy with survivorship by specific language." Henry P. Trawick, Jr., *Trawick's Redfearn Wills and Administration in Florida*, s. 9:7 (2009-2010 edition). See also, s. 689.15, F.S.

[6] Chapter 2010-132, s. 7, Laws of Florida. codified in s. 732.401(5), F.S., which reads, "[t]his subsection does not apply to property that the decedent owned in tenancy by the entireties or joint tenancy with rights of survivorship."

[7] "'[A] Tenancy by the entirety' [means a] tenancy which is created between a husband and wife and by which together they hold title to the whole with right of survivorship so that, upon death of either, other takes whole to exclusion of deceased heirs It is essentially a 'joint tenancy,' modified by the common-law theory that husband and wife are one person, and survivorship is the predominant and distinguishing feature of each.'" BLACK'S LAW DICTIONARY 1164 (Abridged 5th ed. 1983).

Section 731.201(33), F.S., defines "protected homestead" to mean:

> 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 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***.

Although the definition of "protected homestead" in s. 731.201(33), F.S., specifically exempts property owned as tenants by the entirety, from the definition, it does not exempt property owned as joint tenants with rights of survivorship, from the definition.

Spousal Election with Respect to Homestead

During the 2010 Regular Legislative Session, s. 732.401(2), F.S., was amended to provide the surviving spouse with a choice as to whether to take the life estate in the homestead or elect to take an undivided one-half interest in the homestead as a tenant in common in lieu of the life estate.[8] This alternative creates a tenancy in common[9] relationship between the spouse and the decedent's descendants. Section 732.401(2), F.S., also describes who may make the election, when the election must be made, and the manner of the making the election. In addition to the surviving spouse, the election may also be made on behalf of the surviving spouse by an attorney in fact or guardian of an incapacitated spouse with court approval.[10] The election may be made for the surviving spouse only after the court determines that the election is necessary for the spouse's best interest during the incapacitated spouse's probable lifetime. The election must be filed within six months of the decedent's death. The time for making the election may not be extended except as specified in s. 732.401(2)(c), F.S., which states:

> A petition by an attorney in fact or guardian of the property for approval to make the election tolls the time for making the election until 6 months after the decedent's death or 30 days after the rendition of an order authorizing the election, whichever occurs last.

According to the Real Property, Probate, and Trust Law Section of the Florida Bar (RPPTL), there has been some confusion as to when a petition must be filed under s. 732.401(2)(c), F.S., and the tolling effect of filing such a petition.[11]

[8] Chapter 2010-132, s. 7, Laws of Florida.
[9] A tenancy in common is "[a] tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship." BLACK'S LAW DICTIONARY 1478 (7th ed. 1999).
[10] Section 732.401(2)(a), F.S.
[11] Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on Proposed Amendments to Section 732.401(2)(c), F.S., Relating to Spousal Election With Respect To Homestead* (on file with the Senate Committee on Judiciary).

Surviving Spouse's Intestate Share

Section 732.102, F.S., was amended in 2011 to revise the share a decedent's spouse receives as part of an intestate estate under certain circumstances.[12] Specifically, s. 732.102, F.S., was amended to increase the share a decedent's surviving spouse will receive in an intestate estate to the entire intestate estate when all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants.[13] If there are one or more surviving descendants of the decedent who are not lineal descendants of the surviving spouse, then the surviving spouse gets one-half of the intestate estate.[14] If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent, the surviving spouse gets one-half of the intestate estate.[15]

Section 14, ch. 2011-183, Laws of Florida, provides that "except as otherwise expressly provided in this act, this act shall take effect upon becoming a law and shall not apply to all proceedings pending before such date and all cases commenced on or after the effective date." Section 2, ch. 2011-183, Laws of Florida did not expressly address the application of s. 732.102, F.S., (2011), and other statutes amended in ch. 2011-183, Laws of Florida, to apply to estates pending or filed on or after October 1, 2011 for decedents dying before October 1, 2011.[16]

The Real Property, Probate and Trust Law Section of The Florida Bar's Probate Law and Procedure Committee reports that the committee "has received numerous inquiries from lawyers expressing confusion as to whether the statute applies to estates of decedents dying before October 1, 2011 but were pending as of October 1, 2011."[17]

The confusion arose for two reasons:

- First, s. 2, ch. 2011-182, Laws of Florida, did not address whether the amendments to s. 732.102, F.S. (2011), would apply to estates pending on or filed after October 1, 2011. As a result, one could argue that when the statutes became effective on October 1, 2011. As a result, the amendments applied to all pending cases regardless of when the decedent died.[18]
- Second, s. 732.101, F.S., provides that inheritance rights vest at death.[19]

To eliminate any confusion, the Real Property, Probate and Trust Law Section of The Florida Bar supports an amendment to clarify that the 2011 amendments to s. 732.102, F.S., apply only to estates of persons dying on or after October 1, 2011.

[12] Chapter 2011-183, s. 2, Laws of Florida.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on Proposed Amendments to Section 732.102, F.S., Clarifying Effective Date* (2010) (on file with the Senate Committee on Judiciary).
[17] Correspondence with the Real Property, Probate, and Trust Law Section of The Florida Bar (on file with the Senate Committee on Judiciary).
[18] *Id.*
[19] *Id.*

Termination of Parental Rights and Inheritance Rights under Intestacy

Chapter 39, F.S., generally authorizes the termination of parental rights for abuse, abandonment, or neglect. The chapter does not specifically address whether an intestate estate of a child whose parents had their parental rights terminated may take an intestate share of the child's estate. A minor may not legally disinherit a parent whose parental rights have been terminated.[20]

Any property of decedent that is not disposed of by his or her will passes to his heirs by intestate succession.[21] In general, the laws of intestacy are a default for situations when a decedent has failed to or may not make a will. The laws of intestacy attempt to duplicate the dispositive scheme under which the decedent would have wanted if he or she had affirmatively left a valid will.

Section 732.108, F.S., provides requirements for the intestate succession by or from an adopted person. If a child is adopted under the requirements of ch. 63, F.S., then s. 732.108, F.S., provides that for the purposes of intestate succession for the termination of inheritance rights of the natural parents in favor of the adoptive parent or parents. If the child is not legally adopted, for purposes of intestate succession, the inheritance rights of the natural parent whose parental rights have been legally terminated continue to remain.

Under the probate code, a child who becomes 18 and who otherwise meets the requirements to make a will may do so, and may elect whether or not to include a parent whose parental rights have been terminated. The Uniform Probate Committee of the Real Property, Probate, and Trust Law Section of The Florida Bar argues "that it would be appropriate for Florida law to bar inheritance by a parent whose parental rights have been terminated."[22]

III. Effect of Proposed Changes:

Section 1. Definition of Homestead The bill revises the definition of "protected homestead" in s. 733.201, F.S., to clarify that real property owned in joint tenancy with right of survivorship is not protected homestead. Thus, clarifying property not subject to devise may be transferred before a person dies by titling property as a joint tenancy with right of survivorship.

Section 2. Application of 2010 Amendments to Revise the Intestate Share Notwithstanding s. 2 or s. 14 of ch. 2011-183, Laws of Florida, the bill provides that amendments to s. 732.104, F.S., made by s. 2 of ch. 2011-183, Laws of Florida, apply only to the estates of decedents dying on or after October 1, 2011.

Section 732.102, F.S., was amended in 2011 to revise the share a decedent's spouse receives as part of an intestate estate under certain circumstances.[23] Specifically, s. 732.102, F.S., was amended to increase the share a decedent's surviving spouse will receive in an intestate estate to

[20] Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on Proposed Section 732.1081,[F.S.,] Addressing Inheritance Rights of Parents Whose Parental Rights Have Been Terminated* (2010) (on file with the Senate Committee on Judiciary).
[21] Section 732.101(1), F.S.
[22] *Id.*
[23] Chapter 2011-183, s. 2, Laws of Florida.

the entire intestate estate if all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants.[24] If there are one or more surviving descendants of the decedent who are not lineal descendants of the surviving spouse, then the surviving spouse gets one-half of the intestate estate.[25] If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent, the surviving spouse gets one-half of the intestate estate.[26] The 2011 changes to s. 732.102, F.S., already took effect upon becoming a law are amended to clarify that the changes applied to all proceedings pending before such date and all cases commenced on or after that date.

Section 3. Procedure for Election of Homestead Effective July 1, 2012, and applicable to estates of persons dying on or after July 1, 2012, the bill amends s. 732.401(2)(c), F.S., revises the time under which an attorney in fact or guardian must file a petition for authority to make an elections to take an undivided tenant in common interest in a homestead for an incapacitated spouse. The bill also revises the time when such a petition extends the time for making the election for the incapacitated spouse of a decedent. Under the bill, the petition under s. 732.401(2)(c), F.S., must be filed within 6 months of the decedent's death and if timely filed, the attorney-in-fact or guardian shall have at least 30 days after rendition of the order granting the petition to make the election.

Section 4. Termination of Parental Rights Effective July 1, 2012, and applicable to estates of persons dying on or after July 1, 2012, the bill creates s. 732.1081, F.S., to amend the probate code to bar inheritance through intestate succession of a parent from a child in cases when the natural or adoptive parent's parental rights were terminated pursuant to ch. 39, F.S., prior to the death of the child. In such cases, the natural or adoptive parent must be treated as if the parent predeceased the child.

Section 5. Except as otherwise expressly provided in the bill, the bill takes effect upon becoming a law.

Other Potential Implications:

Section 2 of the bill provides that amendments to s. 732.104, F.S., made by s. 2 of ch. 2011-183, Laws of Florida, apply only to the estates of decedents dying on or after October 1, 2011. Section 2 of the bill, provides for retroactive application to clarify the application of s. 2 of ch. 2011-183, Laws of Florida, only estates of decedents dying on or after October 1, 2011, but may not take effect until the effective date of this bill. "An act may not take effect before it becomes a law, and once it becomes a law it is presumed to apply only prospectively. It is possible, however, for a bill to provide that its provisions apply retroactively, as long as: (1) There is no constitutional proscription against making the provisions retroactive; (2) The act overcomes the presumption

[24] *Id.*
[25] *Id.*
[26] *Id.*

that it applies only prospectively by explicitly providing for retroactive application; and (3) Its title conveys notice of this retroactive application."[27]

Additionally, at issue is when considering whether a statute should be retroactively applied, the court should determine: whether there is clear evidence that the Legislature intended to apply the statute retrospectively; and whether retroactive application is constitutionally permissible.[28]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The homestead ad valorem property tax exemption is in article VII, section 6 of the Florida Constitution, as implemented in ch. 193, F.S., is not implicated by the bill.

Effective July 1, 2012, and applicable to proceedings pending before or commenced on or after July 1, 2012, the bill amends the definition of "protected homestead" in s. 733.201, F.S., to clarify that real property owned in joint tenancy with right of survivorship, is not protected homestead. The restrictions on the devise of homestead are in article X, section 4 of the Florida Constitution. Under applicable Florida case law a homestead owned by the decedent and another individual in joint tenancy with rights of survivorship is not subject to the restrictions on devise.[29]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

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[27] The Florida Senate, *Manual for Drafting Legislation*, 68 (6th ed. 2009) (citing *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077 (Fla. 1978) and *Bates v. State*, 750 So. 2d 6 (Fla. 1999). See generally, Norman J. Singer and J.D. Shambie Singer, "Prospective or Retroactive Interpretation," 2 SUTHERLAND STATUTORY CONSTRUCTION § 41:4 (7th ed. 2010).
[28] *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478, 487(Fla. 2008).
[29] *Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d DCA 1984); *Marger v. De Rosa*, 57 So. 3d 866 (Fla. 2d DCA 2011).

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.)

None.

B. Amendments:

None.