

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 757 Estates  
**SPONSOR(S):** Judiciary Committee and Spano  
**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 998

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Ward	Bond
2) Judiciary Committee	15 Y, 0 N, As CS	Ward	Havlicak

### SUMMARY ANALYSIS

A decedent's property may be disposed of according to a will or a trust, or a combination of the two. Property may effectively transfer at death by operation of law as well. Wills and trusts may be contested on several grounds, including undue influence of a beneficiary over the decedent. Other transfers during the life of a decedent may be set aside on the basis of undue influence as well.

The Florida Probate Code and the Florida Trust Code provide that all or any part of a will or trust is void if it is procured by fraud, duress, mistake, or undue influence. While both codes specify grounds for a will contest or trust contest, only the Probate Code contains a provision designating which party has the burden of proof. The bill amends the Trust Code to be consistent with the Probate Code so that the contestant in a trust contest has the burden of proof on all issues, including proving that the trust was not properly executed. The bill also applies the concept of undue influence to all challenges to gifts made during the lifetime of a decedent.

Life insurance proceeds are generally exempt from administration expenses and the claims of creditors. However, the exemption is lost if the insurance proceeds are paid to the insured or the insured's estate. The bill provides that a waiver of the statutory exemption from creditor's claims applicable to insurance proceeds paid to a trust established by the insured must be explicit. The bill provides that the waiver of the exemption cannot be inferred from general language in a trust instrument directing that all debts of the decedent be paid.

An "antilapse" statute prevents a devise from failing, or "lapsing," when the designated beneficiary does not survive the decedent. The Probate Code provides that in the event the will is silent, the share to which a beneficiary who predeceases the testator belongs to his or her heirs as long as those heirs are related no more distantly than descendants of grandparents. The antilapse provision of the Trust Code saves all devises, regardless of familial relationship, for administrative convenience. The bill changes the Trust Code's antilapse provision to make it consistent with the Probate Code, allowing outright devises to be treated more consistently with the settlor or testator's presumed intent. The bill provides that the changes are intended to clarify existing law, are remedial in nature, and apply retroactively.

In 2013, the Legislature added a new section to the Florida Probate Code making void any part of a written instrument that makes a gift to a lawyer or the lawyer's relatives if the lawyer prepared or supervised the execution of the written instrument. The bill adds a section to the amended statute providing that it applies only to written instruments executed on or after the effective date of the 2013 bill, which was October 1, 2013.

The bill does not appear to have a fiscal impact on the state or local governments.

The bill has an effective date of July 1, 2014.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### *Undue Influence*

The Florida Probate Code<sup>1</sup> and Florida Trust Code<sup>2</sup> anticipate that both wills<sup>3</sup> and trusts<sup>4</sup> can be documents that make testamentary disposition of a decedent's assets. Further, some transactions during life<sup>5</sup> are effective upon death outside of a will or a trust. Both codes provide that all or any part of a will or trust is void if it is procured by fraud, duress, mistake, or undue influence.<sup>6</sup>

Although both codes specify grounds for a will contest<sup>7</sup> or trust contest,<sup>8</sup> only the Probate Code contains a provision designating which party has the burden of proof. The proponent of the will has the initial burden of proving due execution of the will. Thereafter, the burden shifts to the will contestant to prove the grounds for the will contest.<sup>9</sup> There is no analogous provision in the Trust Code designating who has the burden of proof in a trust contest.

A presumption<sup>10</sup> of undue influence will arise with respect to a transaction if the contestant can show that a person in a confidential relationship was active in procuring a document under which the contestant is a substantial beneficiary.<sup>11</sup> The presumption of undue influence in will contests is a policy-based presumption that shifts the burden of proof.<sup>12</sup> Courts have recognized that the burden-shifting nature of the presumption of undue influence is applicable whenever that presumption is established.<sup>13</sup> However, because the burden shifting presumption is located in the Florida Probate Code, it could be argued that it only applies in will contests. The current statute does not apply to other undue influence proceedings, including trust contests and challenges to the validity of inter vivos transactions.

The bill amends s. 736.0207, F.S., to provide that the contestant in a trust contest has the burden of proof on all issues, including proving that the trust was not properly executed. The bill provides that this change applies to all cases commenced on or after the effective date of the bill. The bill also amends s. 733.107(2), F.S., to provide that a presumption of undue influence, once it arises, applies to all testamentary challenges including trust contests and challenges to inter vivos gifts.<sup>14</sup> The bill codifies what many practitioners express as the accepted current state of Florida case law. The bill provides the change to s. 733.107, F.S., is remedial in nature and retroactive because it is intended to clarify existing law.<sup>15</sup>

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<sup>1</sup> Chapters 731 through 735, F.S.

<sup>2</sup> Chapter 736, F.S.

<sup>3</sup> Section 731.201(40), F.S.

<sup>4</sup> Sections 736.0403(2) and 736.1106, F.S.

<sup>5</sup> These are called "inter vivos transfers."

<sup>6</sup> Sections 732.5165 and 736.0406, F.S.

<sup>7</sup> Section 733.107, F.S.

<sup>8</sup> Section 736.0207, F.S.

<sup>9</sup> Section 733.107, F.S.

<sup>10</sup> "A presumption is an assumption of fact . . ." Section 90.301(1), F.S.

<sup>11</sup> *In re Carpenter's Estate*, 253 So.2d 697, 703 (Fla. 1971).

<sup>12</sup> Section 733.107(2), F.S.

<sup>13</sup> See, *Newman v. Brecher*, 887 So.2d 384 (Fla. 4th DCA 2004); and *RBC Ministries v. Tompkins*, 974 So.2d 569, 571-72 (Fla. 2d DCA 2008).

<sup>14</sup> The Supreme Court of Florida has expressed its approval of statutes explicitly incorporating s. 90.304, F.S., into a statutory presumption. See, *Universal Ins. Co. of North America v. Warfel*, 82 So.3d 47, 55-60 (Fla. 2012).

<sup>15</sup> Retroactive statutes expressly stated by the Legislature to be remedial in nature are not unconstitutional unless they interfere with a vested right. *Maronda Homes, Inc. of Florida, v. Lakeview Reserve Homeowners Association, Inc.*, 127 So.3d 1258 (Fla. 2013), *American Optical Corporation v. Spiewak*, 73 So.3d 120 (Fla. 2011).

## *Exempt Nature of Life Insurance Proceeds*

Life insurance proceeds are generally exempt from estate administration expenses and the claims of creditors.<sup>16</sup> However, the exemption is lost if the insurance proceeds are paid to the insured or the insured's estate.<sup>17</sup>

Death benefits of any kind, including life insurance proceeds, may be made payable to the trustee of an inter vivos trust.<sup>18</sup> If the insurance proceeds are paid to a trustee of a trust, the statute provides that the insurance proceeds "shall be held and disposed of . . . in accordance with the terms of the trust . . ." <sup>19</sup> Likewise, insurance proceeds may be made payable to the trustee named in a last will that is admitted to probate.<sup>20</sup> The death benefits are not deemed to be part of the decedent's estate and are not subject to obligation to pay creditors of the decedent or probate estate administration until estate assets are depleted.<sup>21</sup>

In the recent case of *Morey v. Everbank*<sup>22</sup> the insured designated his revocable trust as the beneficiary of a life insurance policy. After the insured's death, the trustee filed a petition requesting a court determination that life insurance proceeds payable to the trust were exempt from all "death obligations" and, therefore, unavailable to the estate or the estate's creditors. The trust instrument in *Morey* directed the trustee to pay to the personal representative such amounts certified by the personal representative to be required to pay the settlor's "death obligations," including estate administration expenses, all the settlor's enforceable debts, and all estate taxes.<sup>23</sup>

The court focused on the language in s. 733.808(1), F.S., which provides that life insurance proceeds paid to a trustee "shall be *held and disposed of by the trustee in accordance with the terms of the trust . . .*" The court concluded that the language of the trust together with the entire structure of the trust evidenced an "apparent intent and practical result" that would be the same if the life insurance proceeds were paid directly to the estate.<sup>24</sup> The court ruled that the settlor waived the statutory exemption in s. 222.13, F.S.<sup>25</sup>

The holding in *Morey* is contrary to the generally accepted interpretations of ss. 222.13(1) and 733.808(4), F.S. Practitioners have treated insurance proceeds payable to a trustee of a revocable trust as exempt from the claims of the creditors of the insured's estate unless the trust specifically directs their payment. Practitioners report particular concern that the holding in *Morey* may be interpreted too broadly, and that the case will be construed to erode the long-standing understanding that s. 733.808(4), F.S., was clear in its meaning that proceeds of insurance payable to a trust established by the insured are exempt from creditors' claims in most instances. Before *Morey*, few thought that insurance proceeds to the insured's revocable trust would expose the proceeds of insurance to creditor claims. Practitioners report that the language of s. 733.808(4), F.S., is insufficient to provide protection for both existing and new testamentary plans in light of the *Morey* decision.

The bill provides that a waiver of the statutory exemption from creditor's claims applicable to insurance proceeds paid to a trust established by the insured must be explicit. The proposed language prevents an unintentional waiver by providing that the statutory exemption may only be waived with trust language that specifically refers to s. 733.808(4), F.S. The waiver of the exemption cannot be inferred from general "pay all my debts" type language in a trust instrument. The bill conforms s. 736.05053(1), F.S., to match this change, and provides that the changes in this provision are intended to clarify existing law, are remedial in nature, and apply retroactively.

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<sup>16</sup> Section 222.13(1), F.S.

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

<sup>18</sup> Section 733.808(1), F.S.

<sup>19</sup> *Id.*

<sup>20</sup> Section 733.808(2), F.S.

<sup>21</sup> Sections 733.808(4) and 733.607(2), F.S.

<sup>22</sup> 93 So.3d 482 (Fla. 2012).

<sup>23</sup> *Id.* at 484-85 (quoting Article V of the trust instrument).

<sup>24</sup> *Id.* at 487.

<sup>25</sup> *Id.*

## *Antilapse*

An "antilapse" statute prevents a devise from failing, or "lapsing," when the designated beneficiary does not survive the decedent. The Probate Code provides that a gift to only a "grandparent, or a descendant of a grandparent" is saved from lapse.<sup>26</sup> Currently, the Trust Code's antilapse provision applies to all gifts regardless of familial relationship to the creator of the gift.<sup>27</sup> The statute applies to a "future interest," and does not contain any qualification that the beneficiary of that interest be a blood relative of the settlor. The statute defines "future interest" for purposes of determining lapse.<sup>28</sup> There are inconsistencies between the Probate and Trust Codes on this point. Florida's previous Trust Code, which was amended in 2007, contained an antilapse provision that saved only gifts to grandparents or descendants of grandparents from lapse.<sup>29</sup> A new Trust Code was enacted in 2008, but that Code's antilapse statute does not contain a broad savings clause for gifts made to grandparents or descendants of grandparents. Instead, the current Trust Code's antilapse statute applies to a "future interest," and does not contain any qualification that the beneficiary of that interest be a blood relative of the settlor.

The bill amends s. 736.1106, F.S., to make an outright devise to a deceased beneficiary in a revocable trust or testamentary trust lapse unless the beneficiary was a grandparent, or a lineal descendant of a grandparent of the settlor of a revocable trust or the testator of a testamentary trust. As with wills, this is a default provision, meaning that the settlor or testator can always provide to the contrary in his or her testamentary documents. This would make the Probate Code and Trust Code's antilapse statutes more consistent, which is important given that many people use revocable trust agreements as substitutes for wills. Also, testamentary trusts, which are created under wills, are not covered by the Probate Code's antilapse statute. Instead, the definition of "future interest" under the Trust Code encompasses those devises which create a testamentary trust. Thus, changing the Trust Code's antilapse provision to make it more consistent with the Probate Code allows outright devises to be treated more consistently with the settlor or testator's presumed intent. The bill provides that this provision applies to trusts which become irrevocable after June 30, 2014.<sup>30</sup>

## *Gifts to Lawyers*

In 2013, the Legislature amended s. 732.806, F.S., adding a new section to the Florida Probate Code.<sup>31</sup> The new provision made void any part of a written instrument that makes a gift to a lawyer or a person related to the lawyer void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift. It is noted that the provision makes the gift void rather than voidable,<sup>32</sup> avoiding proof requirements in the event of a contest. The effective date of that bill was October 1, 2013.

The bill adds a subsection to the amended statute providing that it applies only to written instruments executed on or after the effective date of the 2013 bill, October 1, 2013. The bill also provides that the change is remedial in nature and intended to clarify existing law.

The bill provides an effective date of July 1, 2014.

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<sup>26</sup> Section 732.603, F.S.

<sup>27</sup> Section 736.1106, F.S.

<sup>28</sup> "Future interest" includes an alternative future interest and a future interest in the form of a class gift. See, s. 736.1106(1)(c), F.S. "Future interest under the terms of a trust" means a future interest created by an inter vivos or testamentary trust to an existing trust or creating a trust or by an exercise of a power of appointment to an existing trust directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust. See, section 736.1106(1)(d), F.S.

<sup>29</sup> Section 737.6035, F.S. (2007).

<sup>30</sup> A "Living Trust" is a testamentary document after the settlor dies, and thus, while it is revocable during the life of the settlor, it becomes irrevocable upon the settlor's death. *In re Guardianship of Trost*, 100 So.3d 1205 (Fla. 2d DCA 2012).

<sup>31</sup> Section 732.806, F.S.

<sup>32</sup> A voidable event is arguable, and facts may be presented to challenge it. In contrast, a void event requires no proof of fact because it is a legal nullity. See, eg., *McMurrer v. Marion County*, 936 So.2d 19 (Fla. 5th DCA 2006).

## B. SECTION DIRECTORY:

Section 1 amends s. 732.806, F.S., relating to gifts to lawyers and other disqualified persons.

Section 2 provides that the changes to s. 732.806, F.S., are intended to clarify existing law and are remedial in nature.

Section 3 amends s. 733.107, F.S., relating to burden of proof in contests; presumption of undue influence.

Section 4 provides a statement of legislative intent that the changes made regarding s. 733.107, F.S., clarify existing law, are remedial in nature, and apply retroactively.

Section 5 amends s. 733.808, F.S., relating to death benefits; disposition of proceeds.

Section 6 provides a statement of legislative intent that the changes made regarding s. 733.808, F.S., clarify existing law, are remedial in nature, and apply retroactively.

Section 7 amends s. 736.0207, F.S., relating to trust contests.

Section 8 provides a statement of legislative intent that the changes made regarding s. 736.0207 apply to all cases commenced on or after the effective date of the bill.

Section 9 amends s. 736.05053, F.S., relating to trustee's duty to pay expenses and obligations of settlor's estate.

Section 10 provides a statement of legislative intent that the changes made regarding s. 736.05053, F.S., clarify existing law, are remedial in nature, and apply retroactively.

Section 11 amends s. 736.1106, F.S., relating to antilapse; survivorship with respect to future interests under terms of inter vivos and testamentary trusts; substitute takers.

Section 12 provides an effective date of July 1, 2014.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

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

#### 2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

"A statute is presumed not to have retroactive application, but the presumption is rebuttable by clear evidence that the legislature intended that the statute be applied retroactively."<sup>33</sup> The bill provides that some changes are intended to clarify existing law, are remedial in nature, and apply retroactively, making the legislative intent clear.

The Florida Constitution guarantees to all persons the right to acquire, possess and protect property. Article I, s. 9 provides that "[n]o person shall be deprived of life, liberty or property without due process of law."<sup>34,35</sup> "In determining whether a statute applies retroactively, we [the Supreme Court of Florida] consider two factors: (1) whether the statute itself expresses an intent that it apply retroactively; and, if so, (2) whether retroactive application is constitutional."<sup>36</sup>

In this bill, first prong of the test is met. The second prong looks to see if a vested right is impaired.

A statute is not unconstitutionally retrospective in its operation unless it impairs a substantive, vested right. A substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment. To be vested a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand.<sup>37</sup>

"Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes"<sup>38</sup>

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

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<sup>33</sup> *Essex Ins. Co. v. Integrated Drainage Solutions, Inc.*, 124 So.3d 947, 951 (Fla. 2d DCA 2013).

<sup>34</sup> Art. I, s. 9, FLA. CONST.

<sup>35</sup> Note that *res judicata*, the final adjudication of rights in a court proceeding, precludes the setting aside of existing probate decrees unless they were procured by fraud. See, Fla. R. Civ. P. 1.540; 32A Fla. Jur 2d Judgments and Decrees §1.

<sup>36</sup> 10A Fla. Jur 2d Constitutional Law §394, citing *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Ass'n One, Inc.*, 986 So.2d 1279 (Fla. 2008).

<sup>37</sup> *School Bd. Of Miami-Dade County v. Carralero*, 992 So.2d 353 (Fla. 3d DCA 2008)(internal citations omitted).

<sup>38</sup> *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961).

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 12, 2014, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provides that the provision enacted in 2013 which made void certain gifts to lawyers and their relatives is applicable only to written instruments made on or after October 1, 2013.

On March 21, 2014, the Judiciary Committee adopted two amendments and reported the bill favorably as a committee substitute. The amendments provide:

- The changes to s. 733.107, F.S., are intended to clarify existing law, are remedial in nature, and are retroactive; and
- The changes to s. 736.0207, F.S., apply to all cases commenced on or after July 1, 2014.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.