

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 267 Estates  
**SPONSOR(S):** Civil Justice & Claims Subcommittee; Berman  
**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/CS/SB 724

| REFERENCE                                     | ACTION              | ANALYST   | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|---|---------------------|-----------|--|
| 1) Civil Justice & Claims Subcommittee        | 15 Y, 0 N, As<br>CS | MacNamara | Bond                                     |
| 2) Agriculture & Property Rights Subcommittee | 11 Y, 0 N           | Thompson  | Smith                                    |
| 3) Judiciary Committee                        | 18 Y, 0 N           | MacNamara | Camechis                                 |

### SUMMARY ANALYSIS

A surviving spouse has a right to elect a share of the deceased spouse's estate, different than what the surviving spouse would have received under the will, known as the elective share. Current law provides which assets are included in determining the value of a decedent's elective estate. The elective share is 30% of that elective estate. Current law also provides the procedural requirements a surviving spouse must follow in order to claim the elective share.

The state's Constitution provides protections for certain property referred to as homestead. Whether the value of the homestead property is included in the elective share calculation depends upon how the homestead property is titled. The bill provides that the value of the homestead property is included in the calculation regardless of how such property is titled, unless the surviving spouse waives his or her right to such homestead property. The bill also provides a method for valuing such homestead property for purposes of the elective share.

Paying the elective share may require transfer of property from others in satisfaction of a required contribution to the elective share. The bill adds an assessment of interest for contribution unpaid more than 2 years after the death of the decedent. The bill provides for an award of attorney fees and costs in certain elective share proceedings. The bill also extends the period of time the surviving spouse can petition a court for an extension of time to file for the elective share and expands the scope of trusts that are included under the savings clause to include an elective share trust, even where a marital deduction is not elected.

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

The effective date of the bill is July 1, 2017.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Probate is the legal process for determining and paying for the debts of the deceased and distributing the deceased's property to 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 constitutional and statutory guidelines.

Notwithstanding the general freedom and right that one has to distribute his or her property by will as one sees fit, there are two significant limitations to such right that apply to the estate of a decedent who was married at the time of his or her death:

- Exempt property and homestead property transfer to the surviving spouse outside of probate.
- The elective share provisions provide for a set inheritance for a surviving spouse, different than the spouse would otherwise receive by operation of the will; and

The bill amends portions of the Florida Probate Code pertaining to the elective share.

#### **Background - Homestead Property Law**

Homestead property constitutional provisions and laws are designed to protect a surviving spouse from financial ruin. Article X, s. 4 of the state Constitution protects homestead property in three different ways: limits on property tax; protection from forced sale by creditors; and restrictions on a homestead owner's right to alienate or devise the homestead property. Only the third, restricting devise of a homestead, is relevant to this bill. Statutory law, at ss. 732.401(1) and (2), F.S., addresses the descent (transfer of property to descendants) of homestead property where no devise is allowed. The statute provides:

(1) [T]he 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 in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

#### **Background - Elective Share, In General**

Like the constitutional and statutory homestead laws, elective share law is also designed to protect a surviving spouse from financial ruin caused by the death of the other spouse.<sup>1</sup> The state's elective share laws are codified in Part II of ch. 732, F. S. Sections 732.201 - 732.2155, F.S., in the aggregate give the surviving spouse of a decedent who was domiciled in the state on his or her death the right to a forced share of the decedent's estate. Generally stated, the elective share is 30% of the aggregate value of the all of the decedent's assets at death. There are technical rules that govern what is included in the asset base against which the elective share can be taken, and the valuation of those assets for elective share purposes.

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 spouse (not mentioned in the will because the will was written

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<sup>1</sup> *In re Anderson's Estate*, 394 So.2d 1146 (Fla. 4th DCA 1981).

prior to the marriage). The elective share is in addition to the spouse's right to exempt property, a family allowance, and homestead.<sup>2</sup>

The right to claim the elective share may be exercised by the surviving spouse or, with court approval, by an attorney in fact or guardian of the property of the surviving spouse. Before approving the election, the court must determine that the election is in the best interests of the surviving spouse during the spouse's probable lifetime. The statute provides several requirements and guidelines for the right of election:

- The election must be made within 6 months after the decedent's death and during the surviving spouse's lifetime;
- A petition by an attorney in fact or by a guardian of the property of the surviving spouse for approval to make the election must be filed within 6 months after the decedent's death and during the surviving spouse's lifetime. If the petition is timely filed, the time for making the election must be extended for at least 30 days after the rendition of the order allowing the election;
- Once made, the election is irrevocable; and
- The election must be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located.<sup>3</sup>

Prior to an election being made, expenses relating to the ownership of the homestead are allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen, in accordance with ch. 738, F.S. If an election is made, expenses relating to the ownership of the homestead shall be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares, effective as of the date the election is filed for recording.<sup>4</sup>

Once the entry of the order determining the surviving spouse's entitlement to the elective share has occurred, the personal representative must file and serve a petition to determine the amount of the elective share.<sup>5</sup> The petition is to contain:

- The name and address of each direct recipient known to the personal representative;
- A description of the proposed distribution of assets to satisfy the elective share, and the time and manner of distribution; and
- An identification of those direct recipients, if any, from whom a specified contribution will be required and a statement of the amount of contribution sought from each.

Fla. Prob. R. 5.340 requires an inventory of the elective estate to be served together with the petition. Within 20 days after the service of the petition to determine the amount of the elective share, any interested person is permitted to serve an objection to the amount of, or distribution of, assets to satisfy the elective share. The objection must state with particularity the grounds upon which it is based. If an objection is served, the personal representative has to promptly serve a copy of the objection on all interested persons who have not previously been served.

If no objection is timely served, the court must enter an order on the petition. The order that is entered is required to:

- State the amount of the elective share;

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<sup>2</sup> s. 732.2105, F.S.

<sup>3</sup> s. 732.401(2)(a-e), F.S. The statute also contains language to include in the notice.

<sup>4</sup> s. 732.401(3), F.S.

<sup>5</sup> Fla. Prob. R. 5.360(c).

- Identify the assets to be distributed to the surviving spouse in satisfaction of the elective estate; and
- If contribution is necessary, specify the amount of contribution for which each direct recipient is liable.

## **Background - Interaction between Protected Homestead and the Elective Share**

When a spouse dies, the manner in which the marital residence was titled at the time of death can impact the amount of the elective share to which the surviving spouse is entitled. Specifically, the elective share calculation can be different depending on whether the marital residence was owned as tenants by the entirety by both spouses (in which case the marital residence by statute is not "protected homestead") or was owned solely by the deceased spouse (in which case the marital residence is "protected homestead"), even though in both cases the surviving spouse may end up with the same ownership interest in the marital residence.

This anomaly results from the interaction between the Florida homestead statutes and the elective share statutes. Property that is the protected homestead of the decedent is presently excluded from the calculation of the elective estate under s. 732.2045, F.S., and is not an asset to be considered for purposes of satisfaction of the elective share under s. 732.2075, F.S. Conversely, property owned by the decedent and the surviving spouse as tenants by the entireties is included in the calculation of the elective estate at one-half of the fair market value of the property as of the decedent's date of death under s. 732.2035(3), F.S., and at the same value for purposes of satisfaction of the elective share under s. 732.2075, F.S. Accordingly, the surviving spouse of a decedent with protected homestead (that is, where the home was owned solely by the decedent) would receive more upon the decedent's death (the homestead plus the elective share) than a surviving spouse that owned property with the decedent where the property was not considered protected homestead (that is, where the home was owned as tenants by the entireties). This different treatment is based on an asset titling decision (or mistake) and not on any apparent policy difference.

## **Effect of the Bill**

### *Treatment of the Homestead Property as it Relates to the Elective Share*

The bill includes the protected homestead in the value of the elective estate, thereby equalizing the calculation of the elective share regardless of how the homestead was titled. Additionally, the bill provides for the valuation of the interest in the protected homestead that the surviving spouse receives as part of his or her elective share. Specifically, the bill provides that the value of the protected homestead is:

- The fair market value of the protected homestead on the date of the decedent's death if the surviving spouse received a fee simple interest in the property;
- One half of the fair market value of the protected homestead on the date of the decedent's death if the spouse takes a life estate in the property or elects to take an undivided one-half interest as a tenant in common; or
- In the event the surviving spouse validly waives his or her homestead rights, but nevertheless receives an interest in the protected homestead, the value of the spouse's interest is determined as property interests that are not protected homestead.

The bill provides a definition for fair market value for purposes of valuing the elective estate as the "net aggregate amount, as of the date of the decedent's death, of all mortgages, liens, and security interests in which the protected homestead is subject and for which the decedent is liable, but only to the extent that such amount is not otherwise deducted as a claim paid or payable from the elective share.

The bill excludes the protected homestead from the elective estate if the surviving spouse waives his or her homestead rights in a marital agreement under s. 732.702, F.S., or otherwise, and receives no

interest in it. This has the effect of preventing a spouse who has waived his or her right to the homestead in a premarital or post-marital agreement during the decedent's lifetime from circumventing the marital agreement by claiming a portion of the homestead's value indirectly by taking the elective share after the decedent's death.

### Timely Election

The surviving spouse must make a timely election to take the elective share; otherwise the right to the elective share is forfeited.

The surviving spouse's right of election may be exercised by various persons. It, of course, may be exercised by the surviving spouse. It may also be exercised by an attorney in fact or a guardian of the property of the surviving spouse as long as there is the approval of the court having jurisdiction of the probate proceeding.<sup>6</sup> The court, before it approves the election, is required to determine that the election is in the best interests of the surviving spouse, during the spouse's probable lifetime.

The election must be filed on or before the earlier of the date that is 6 months after the date of service of a copy of the notice of administration on the surviving spouse (or served on an attorney in fact or guardian of the property of the surviving spouse), or the date that is two years after the date of the decedent's death.<sup>7</sup>

Before the deadline, the surviving spouse may petition the court for an extension of time to make an election. The court, for good cause shown, may extend the time for the election. If the court grants the petition for an extension, then the election must be filed within the time allowed by the extension.<sup>8</sup> A petition for an extension of time for making the election or for approval to make the election tolls the time for making the election.<sup>9</sup>

The bill amends s. 732.2135(2), F.S., to add that a surviving spouse (or attorney in fact, or guardian of the property of the surviving spouse) may also petition the court for an extension of time for making an election within the 40 days after the date of termination of any proceeding which affects the amount the spouse is entitled to receive under s. 732.2075(1), F.S., but no more than 2 years after the decedent's death.

### Contribution

In some instances, a person receives property of the deceased that is necessary for the estate to pay the elective share amount. Contribution refers to the amount such person owes. An order requiring contribution bears interest at the statutory rate commencing 90 days after entry by the probate court. This bill amends ss. 732.2085(3)(a) and 732.2145(1), F.S., to add that interest on a required contribution starts to accrue 2 years after death of the deceased, even if an order of contribution has not been entered at that time.

### Attorney Fees

The bill grants courts the power to award attorney fees and costs when there is an objection or dispute over entitlement to or the amount of the elective share, the property interests included in the elective share or its value, or the satisfaction of the elective share. It adopts the same standard for granting an award of costs and attorney fees that is used in and is applicable to surcharge actions and proceedings to modify a will or trust.<sup>10</sup> A court may direct payment from the estate or from a party's interest in the

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<sup>6</sup> See s. 732.2125(2), F.S.

<sup>7</sup> s. 732.2135(1), F.S.

<sup>8</sup> s. 732.2135(2), F.S.

<sup>9</sup> s. 732.2135(4), F.S.

<sup>10</sup> ss. 733.609, 732.615, 732.616 and 736.1004, F.S.

elective share or the elective estate, or may enter a judgment that can be satisfied from other property of the party.

Section 732.2135(5), F.S., gives the probate court the right to award attorney's fees and costs against the surviving spouse makes an elective share election in bad faith. Bad faith is not defined in this context. The bill repeals the subsection, repealing the ability of the probate court to award attorney's fees for bad faith filing of an elective share election under this statute.

### The Savings Clause and Elective Share Trusts

Under the Code, a trust referred to as an "elective share trust," may be established for the benefit of a surviving spouse. If properly formed, the elective share trust avoids a claim to an elective share. An elective share trust is a trust under which:

- The surviving spouse is entitled for life to the use of the property or to all of the income, payable at least 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.

Moreover, s. 738.606, F.S., part of the Florida Uniform Principal Income Act, provides special protections when a marital deduction may be taken under the Internal Revenue Code or comparable law of any state. Specifically, where a deduction is allowed for all or part of a trust that must be distributed to the grantor's spouse, and the assets of which consist substantially of property that does not produce sufficient income for the spouse, the spouse may require the trustee to make the property productive of income, convert property within a reasonable time, or exercise the power conferred by ss. 738.104 and 738.1041, F.S., related to a trustee's power to adjust.

Under current law, not all elective share trusts will be made subject to a marital deduction election.

The bill expands the scope of the savings clause found in s. 738.606, F.S., to include an "elective share trust," as that term is defined in s. 732.2025(2), F. S. As with marital trusts intended to qualify for the estate tax marital deduction (which trusts are presently protected by the savings provisions of s. 738.606, F.S.), to qualify as an elective share trust, the governing instrument that creates the trust must give the surviving spouse the power to compel the trustee to convert property that is not productive of income into property that is productive.

Because not all elective share trusts will be made subject to a marital deduction election, the bill specifically extends the savings provision of s. 738.606, F.S., to those elective share trusts for which a marital deduction is not elected in order to satisfy the requirements for an elective share trust.

### Effective Date of the Bill

The changes made by this bill apply to the estates of decedents dying after July 1, 2017.

#### B. SECTION DIRECTORY:

Section 1 amends s. 732.2025, F.S., relating to definitions.

Section 2 amends s. 732.2035, F.S. relating to property entering into the elective share.

Section 3 amends s. 732.2045, F.S., relating to exclusions and overlapping application.

Section 4 amends s. 732.2055, F.S., relating to valuation of the elective share.

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

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

Section 7 amends s. 732.2095, F.S., relating to valuation of property satisfying elective share.

Section 8 amends s. 732.2115, F.S. relating to protection of payors and other third parties.

Section 9 amends s. 732.2135, F.S., relating to time of election; extensions; withdrawal.

Section 10 amends s. 732.2145, F.S., relating to order of contribution and duty to collect.

Section 11 creates s. 732.2151, F.S., relating to award of fees and costs.

Section 12 amends s. 738.606, F.S., relating to property not productive of income.

Section 13 relates to applicability.

Section 14 provides for an effective date of July 1, 2017.

## **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 government revenue.

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

The bill does not appear to have any impact on state government 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 may have a fiscal impact as a result of awarding attorney fees and costs in certain elective share proceedings. The impact could be positive for attorneys, beneficiaries, or spouses who are required to file actions while pursuing claims related to the elective share. The impact could also be negative on estates and beneficiaries defending against such actions as an award for attorney fees and costs against the estate could come out of assets in the estate.

The bill may have a fiscal impact for parties responsible for contributing towards the elective share and parties awaiting contributions to satisfy their elective share. An award of interest would have a negative impact on beneficiaries responsible for contributing to the elective share and a positive impact on surviving spouses who have not had their elective share satisfied.

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:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 13, 2017, the Civil Justice & Claims Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by removing a section that would have changed the percentage of the elective estate that constitutes the surviving spouses elective share. This analysis is drafted to the committee substitute as passed by the Civil Justice & Claims Subcommittee.