

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 421 Homestead Waivers  
**SPONSOR(S):** Judiciary Committee; Berman  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 512

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	9 Y, 0 N	MacNamara	Bond
2) Agriculture & Property Rights Subcommittee	13 Y, 0 N	Thompson	Smith
3) Judiciary Committee	18 Y, 0 N, As CS	MacNamara	Poche

### SUMMARY ANALYSIS

Florida's Constitution prohibits the transfer of homestead property through a will or trust where the owner has a spouse or minor child, but permits transfer of the property to the spouse where there is no minor child. A spouse, however, may waive his or her interest in the homestead property through a written contract or agreement. A spouse's waiver must be knowing and intelligent.

CS/HB 421 provides "safe harbor language" that may be included in a deed where a spouse elects to waive his or her right to inherit homestead property.

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

The effective date of the bill is July 1, 2018.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

##### Homestead Property

A homestead is a constitutionally defined status, not a property interest. Article X, s. 4(a)(1) of the Florida Constitution provides protections for homestead property owned by "natural persons." A homestead is protected in three different ways:

- It is exempt from certain taxes;
- It is protected from forced sale by creditors; and
- An owner is restricted from alienating or devising the homestead property.

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

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 surviving spouse or heirs under s. 4(b), Art. X of the State Constitution.

Homestead property owned by the decedent in either a joint tenancy with rights of survivorship or tenancy by the entireties is not protected homestead because a decedent's interest in the homestead property terminates at death.<sup>1</sup> Current law addresses the transfer of homestead property to descendants where no devise is permitted. Specifically, s. 732.401, F.S., provides:

(1) 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 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.

There is no constitutional restriction on the devise of the homestead property when there are no surviving minor children and the surviving spouse has waived his or her homestead rights.<sup>2</sup>

##### Waiver of Homestead Rights by Surviving Spouse

Under s. 732.702, F.S., a surviving spouse can waive, wholly or partly, certain estate allowances, including a homestead, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses as provided by statute. The statute requires fair disclosure where the contract, agreement, or waiver is signed after marriage and specifies that no consideration other than execution is required.

In order to determine that a surviving spouse has waived or relinquished homestead protection, evidence must demonstrate the spouse's intent to waive the constitutional and statutory claim to homestead property. Courts require waivers of constitutional rights to be knowingly and intelligently.<sup>3</sup>

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<sup>1</sup> S. 732.401(5), F.S.

<sup>2</sup> *City Nat'l Bank of Fla. v. Tescher*, 578 So.2d 701, 703 (Fla. 1991).

Recently, Florida courts have addressed the issue of whether joining in a deed constitutes a waiver of homestead rights. In *Stone v. Stone*<sup>4</sup>, the Fourth District Court of Appeal held that a spouse waived her homestead rights when she joined in the execution of a warranty deed on the property, despite her position that she did not intend to waive her constitutional homestead rights. The court relied on s. 732.702(1), F.S., providing that “a waiver of ‘all rights,’ or equivalent language” in a written contract, agreement, or waiver, is a waiver of all rights in homestead property.<sup>5</sup>

As the *Stone* case shows, Florida courts allow a spouse to waive her rights in homestead property through the execution of a deed conveying the property. Moreover, the case illustrates instances where the language in the deed may be sufficient to establish waiver under s. 732.702, F.S., despite a surviving spouse’s contention that their waiver was not knowingly and intelligent at the time he or she executed the deed.

### Effect of Proposed Changes

CS/HB 421 creates safe harbor language that may be placed in a deed, indicating that a spouse is waiving his or her rights in a homestead property. Specifically, the following language contained in a deed constitutes an intentional waiver of homestead rights by a spouse:

“By executing or joining in this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me.”

The waiver language is not considered a waiver of the:

- Protection against the owner’s creditors during the owner’s lifetime and after death; or
- Restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner’s spouse.

The effective date of the bill is July 1, 2018.

#### B. SECTION DIRECTORY:

**Section 1:** Creates s. 732.7025, F.S., related to waiver of homestead rights through deed.

**Section 2:** Provides an effective date of July 1, 2018.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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

1. Revenues:

None.

2. Expenditures:

None.

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<sup>3</sup> *Rutherford v. Gascon*, 679 So. 2d 329 (Fla. 2d DCA 1996); See also *Chames v. DeMayo*, 972 So.2d 850 (Fla. 2007).

<sup>4</sup> 157 So.3d 295 (Fla. 4th DCA 2014); See also *Lyons v. Lyons*, 155 So.3d 1179 (Fla. 4th DCA 2014); *Habeeb v. Linder*, 36 Fla. L. Weekly D300 (Fla. 3d DCA 2011).

<sup>5</sup> *Stone*, 157 So.3d at 304 (The court found that the language “all tenements, hereditaments, and appurtenances thereto belonging or in otherwise appertaining” in the deed constituted “all rights, or other equivalent language” for purposes of waiving spousal rights pursuant to S. 732.702(1), F.S.).

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

1. Revenues:

None.

2. Expenditures:

None.

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

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

Not applicable.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On February 15, 2018, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed the term “presumed” to clarify that the inclusion of the safe harbor language acts as an affirmative waiver of the spouse’s right to inherit homestead property.
- Amended the safe harbor language to provide that a spouse waives his or her rights to homestead property by executing a deed, in addition to joining in a deed.

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