

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1307 Decedents' Property

SPONSOR(S): Driskell

TIED BILLS: **IDEN./SIM. BILLS:** SB 1154

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N	Rochester	Poche
2) Justice Appropriations Subcommittee	12 Y, 0 N	Jones	Gusky
3) Judiciary Committee			

SUMMARY ANALYSIS

Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries. A will is a legal document that a person (a testator) may use to determine who gets their property when they die. A personal representative, a person designated by the will or the circuit court to serve in that role, must provide a notice of administration to various parties, including family members and beneficiaries, and other entities.

HB 1307 revises probate laws relating to co-owned personal property, notice in probate proceedings, personal representative conflict of interest, and compensation of an attorney who serves as a personal representative. Specifically, the bill:

- Abolishes the unities of time and title as requirements for a joint tenancy with right of survivorship or a tenancy by the entirety in personal property;
- Abolishes the unity of interest as a requirement for a joint tenancy with right of survivorship in personal property;
- Defines precious metal such as bullion or coins as tangible personal property;
- Declares formal notice insufficient to invoke the court's personal jurisdiction over the person receiving notice;
- Renders voidable any sale or encumbrance to a corporation, trust, or other entity in which a personal representative or his or her spouse, agent, or attorney has a substantial beneficial or ownership interest; and
- Prohibits an attorney, or person related to the attorney, from receiving compensation for serving as a fiduciary if the attorney prepared or supervised the execution of the will or trust, unless the attorney:
 - Is related to the client; or
 - Makes certain disclosures to the client in writing before the will or trust is signed.

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

Except as otherwise provided, the bill has an effective date of October 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries. A will, very generally, is a legal document that a person (a testator) may use to determine who gets their property when they die. Wills do not dispose of all of a testator's property, but only their estate, or those assets that are subject to probate administration.¹ Other assets are disposed of outside of probate.

Without a will, a decedent's estate is distributed pursuant to the intestacy statutes, which devise a decedent's estate according to default rules. With a will, however, a testator may devise the estate to whomever they prefer.

In order for the decedent's estate to be transferred to heirs or to the beneficiaries of the will, a petition for administration must be filed with the circuit court.² A personal representative, a person designated by the will or the circuit court to serve in that role, must provide a notice of administration to various parties, including family members, beneficiaries, and other entities.³ The personal representative must search for and provide notice to the decedent's creditors.⁴ In order for personal representatives to claim monies from bank accounts for the estate, the court must issue letters of administration granting the personal representative the authority to act on the estate's behalf. The letters give the personal representative the authority to gather assets, pay a creditor, and pay an heir or beneficiary.

Co-owned Personal Property

Background

Personal property, such as a brokerage account or an automobile, may be owned by multiple people in a type of legal co-ownership, such as a tenancy by the entirety or a joint tenancy with right of survivorship.⁵ Although these forms of co-ownership are substantially similar, a tenancy by the entirety may be used only by two married people.⁶

Joint Tenancy with Right of Survivorship

Personal property must meet five conditions, or unities, to form a joint tenancy with right of survivorship:

- Possession - each tenant has the right to possess the entire property;
- Interest - each tenant has an equal interest in the property;
- Title - all tenants acquire title by the same instrument;
- Time - each tenant takes his or her share at the exact same time; and
- Survivorship - a co-tenant receives an interest in a property automatically upon the death of another co-tenant.⁷

¹ S. 732.201(14), F.S.

² S. 733.202, F.S.

³ S. 733.212, F.S.

⁴ S. 733.2121, F.S.

⁵ *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45, 52 (Fla. 2001).

⁶ *Id.*

⁷ *Sitomer v. Orlan*, 660 So. 2d 1111, 1113 (Fla. 4th DCA 1995).

Tenancy by the Entirety

A tenancy by the entirety requires an additional condition: the unity of marriage, which means the property co-owners must be married at the time the property became titled in their joint names.⁸

Due to the unities of time and title, a person may not create either a tenancy by the entirety or a joint tenancy with right of survivorship by directly granting a property interest to another person. For example, a husband who solely owns a brokerage account may not create a tenancy by the entirety with his wife by adding her name to the account since their interests originated at different times and through different instruments.⁹

Presumptions Regarding a Co-Ownership

Personal property is presumed to be held as a tenancy by the entirety if it is owned:

- By two people who are married to each other; and
- In accordance with the six unities required for a tenancy by the entirety.¹⁰

Real property held by a married couple is presumed to be a tenancy by the entirety.¹¹ A deposit or account made in the name of a married couple is considered a tenancy by the entirety unless otherwise specified in writing.¹² The presumption may be overcome only by proof of fraud, undue influence, or clear and convincing proof of a contrary intent.¹³ Florida law does not provide a presumption that other personal property co-owned by married tenants are held as a tenancy by the entirety.

As with personal property held jointly by two people who are married to each other, Florida law does not provide a presumption that all items of personal property co-owned by multiple *non-married* people are held as a joint tenancy with right of survivorship. However, the co-owners in a bank account are presumed to have a right of survivorship.¹⁴ As with tenancies by the entirety in bank accounts, the presumption may be overcome by proof of fraud, undue influence, or clear and convincing proof of a contrary intent.¹⁵

Effect of Proposed Changes

HB 1307 abolishes unities of time and title as requirements for a joint tenancy with right of survivorship or a tenancy by the entirety in personal property. As a result, personal property co-owners need not have acquired their interests at the same time or through the same instrument in order to own the property in one of these tenancies. The bill also abolishes the unity of interest as a requirement for a joint tenancy with right of survivorship in personal property, which means co-owners do not need to have equal ownership interests.

⁸ *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45, 52 (Fla. 2001).

⁹ A husband or wife may create a tenancy by the entirety in real property (e.g., home, land) by directly granting an interest to his or her spouse. S. 689.11, F.S.

¹⁰ *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45, 52 (Fla. 2001). *Cacciatore v. Fisherman's Wharf Realty Ltd. Partnership ex rel. Emalfarb Investment Corp.*, 821 So. 2d 1251 (Fla. 4th DCA 2002). *Gibson v. Wells Fargo Bank, N.A.* 255 So. 3d 944, (Fla. 2nd DCA 2018).

¹¹ *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45 at 52.

¹² *Wexler v. Rich*, 80 So. 3d 1097, 1101 (Fla. 4th DCA 2012), for a discussion of the common law rule that preceded the current version of s. 655.79(1), F.S.

¹³ S. 655.79(2), F.S.

¹⁴ S. 655.79(1), F.S.

¹⁵ S. 655.79(2), F.S.

The bill provides a rebuttable presumption that personal property owned by both spouses is owned in a tenancy by the entirety if:

- An ownership document does not specify a different intent;
- There is a designation of joint tenancy with right of survivorship in an ownership document and no express indication that a tenancy by the entirety was not intended; or
- The co-ownership was created by a spouse adding his or her spouse's name to an ownership document.

The intent to create a tenancy by the entirety in personal property is presumed when a spouse designates this tenancy in an ownership document. This intent is also presumed when an owner adds the name of his or her spouse to an ownership document that designates a tenancy by the entirety, if the designation or addition was not the product of fraud, undue influence, or a lack of capacity.

The bill provides a rebuttable presumption that personal property is owned in a joint tenancy with right of survivorship if the owner designates or adds at least one other person in an ownership document. However, the document must indicate that the property is owned by the co-tenants in a joint tenancy with right of survivorship.

The bill also provides that the interests held by joint tenants with right of survivorship or tenants in common hold equal interests in personal property. This presumption may be overcome by proving by a preponderance of the evidence the existence of fraud, undue influence, lack of capacity, or contrary intent.

Precious Metals and Collectible Coins

Background

Tangible property is personal property that can be felt or touched, such as a motor vehicle, jewelry, or furniture. Intangible property is personal property that has no physical existence, such as stock, a bond, a patent, or a trademark. Intangible property is not intrinsically valuable, but is representative or evidence of value. Tangible personal property is subject to devise by a tangible personal property clause in a will or a separate writing, while intangible property generally passes in accordance with a residuary clause in a will, in the absence of other specific direction.¹⁶ Florida law does not specify whether certain types of precious metal, such as coins and bullion,¹⁷ constitute tangible personal property or intangible property.

Effect of Proposed Changes

HB 1307 defines precious metal in any tangible form, such as bullion or coins kept apart from their normal use as legal tender for payment, as tangible personal property. The bill applies retroactively to a written will or codicil and a proceeding pending or commenced before or after July 1, 2019, in which the disposition of precious metal in a tangible form has not been finally determined.

The definition provides clarity in circumstances where the will does not specify what tangible personal property is and no other evidence of the testator's intent is apparent.

¹⁶ Jennifer Hillman, *Tangible Personal Property: What Does it Encompass?* (Jan. 12, 2015), <https://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/posts/tangible-personal-property-what-does-it-encompass> (last visited Mar. 28, 2019).

¹⁷ Bullion is gold or silver in bulk before coining, or valued by weight.

Notice to Interested Persons

Background

Jurisdiction

Jurisdiction is the power of a court to adjudicate a case. There are three components of jurisdiction:

- Subject matter jurisdiction;
- Territorial jurisdiction; and
- Personal jurisdiction.¹⁸

Subject matter jurisdiction is the court's authority to decide the issue in controversy, such as a contracts or a civil rights issue.¹⁹ Territorial jurisdiction is the court's power over events and persons within the boundaries of a particular geographic territory. If a court does not have territorial jurisdiction over the events or persons within it, the court cannot bind a defendant to an obligation or adjudicate any rights.²⁰

Personal jurisdiction refers to a court's authority to make a decision regarding the party being sued in a case. There are 3 types of personal jurisdiction:

- *In personam* jurisdiction;
- *In rem* jurisdiction; and
- *Quasi in rem* jurisdiction.²¹

In personam refers to courts' power to adjudicate matters directed against a party. A court with jurisdiction over a particular location may exercise *in personam* jurisdiction over a person who resides, maintains connections, or is served notice of legal proceedings in that location. *In rem* jurisdiction refers to the power of a court to adjudicate matters over real or personal property. *Quasi in rem* jurisdiction refers to a court's authority over a party who owns property within the court's jurisdictional boundaries.²²

Formal Notice and Summons

Formal notice may be served by sending a copy of a pleading or motion to an interested person by any commercial delivery service or mail carrier requiring a signed receipt.²³ A sheriff's deputy or process server may serve a summons by delivering a copy to the interested person's home, leaving it with any person residing there who is age 15 or older and informing the person of their contents.²⁴ Currently, formal notice in a probate proceeding is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's estate interest or in the decedent's protected homestead.²⁵

Effect of Proposed Changes

HB 1307 declares formal notice insufficient to invoke the court's personal jurisdiction over the person receiving notice. As a result, a petitioner must obtain personal jurisdiction over an adverse party by service of a summons, under ch. 48, F.S. These provisions are effective upon becoming law.

¹⁸ Legal Information Institute, *Jurisdiction*, <https://www.law.cornell.edu/wex/jurisdiction> (last visited Mar. 28, 2019).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Fla. R. Prob. P. 5.040

²⁴ A process server is a person authorized to serve initial nonenforceable civil process on a person found within the circuit where the process server is certified when a civil action has been filed against such person in the circuit court or in a county court in the state. Ss. 48.27, 48.031, and 48.201, F.S.

²⁵ S. 731.301, F.S.

Personal Representative Conflict of Interest

Background

A personal representative is a fiduciary appointed by the court to administer an estate. A personal representative is liable to an interested person for damage or loss resulting from a breach of fiduciary duty.²⁶

Unless a will or contract entered into by the decedent expressly authorizes the transaction or the court approves the transaction after notice to interested persons; an interested party may void a sale or encumbrance to a:

- Personal representative;
- Personal representative's spouse, agent, or attorney; or
- Corporation or trust in which the personal representative has a substantial beneficial interest.²⁷

Effect of Proposed Changes

HB 1307 renders voidable any sale or encumbrance to a corporation, trust, or other entity in which the personal representative or his or her spouse, agent, or attorney has a substantial beneficial or ownership interest. This protects a beneficiary's estate interest by allowing them to void a transaction if it arose out of a conflict of interest.

Attorneys Serving as Personal Representatives or Trustees

Background

A licensed attorney who serves as a personal representative of an estate and renders legal services in the administration of the estate is permitted a fee for the legal services, in addition to his or her fee as personal representative.²⁸ However, the fee for legal services must be considered when determining the attorney's compensation for non-legal services as personal representative.²⁹ Similarly, an attorney who provides legal services in his or her administration of the trust may accept reasonable compensation for the legal services in addition to his or her reasonable trustee compensation.³⁰

Effect of Proposed Changes

HB 1307 prohibits an attorney, or person related to the attorney, from receiving compensation for serving as a fiduciary if the attorney prepared or supervised the execution of the will or trust, unless the attorney:

- Is related to the client; or
- Makes the following disclosures to the client in writing before the will or trust is signed:
 - Subject to limited exceptions, a corporate fiduciary or any person, including a spouse, an adult child, a friend, or an attorney, is eligible to serve as a fiduciary;
 - Any person, including an attorney, who serves as a fiduciary is entitled to receive reasonable compensation, and
 - Compensation payable to the fiduciary is in addition to any attorneys' fees payable to the attorney or the attorney's firm for legal services.

²⁶ S. 733.602, F.S.

²⁷ S. 733.610, F.S.

²⁸ S. 733.617, F.S.

²⁹ S. 733.612(19), F.S.

³⁰ S. 733.0708(3), F.S.

The testator must execute a written statement acknowledging that the disclosures were made prior to the will or trust's execution. The written acknowledgment must be in a separate writing from the will or trust, but it may be annexed to the will or trust. The written acknowledgment may be executed before or after the execution of the will or trust.

The statutes do not affect the validity of the instrument and do not disqualify the named fiduciary from serving. Thus, the attorney can serve without a signed acknowledgment. However, the service will be without compensation to the fiduciary.

B. SECTION DIRECTORY:

Section 1: Creates s. 689.151, F.S., relating to tenancies by the entirety, joint tenancies with right of survivorship, and tenancies in common in personal property.

Section 2: Creates s. 731.1065, F.S., relating to precious metals.

Section 3: Amends s. 731.301, F.S., relating to notice.

Section 4: Creates an unnumbered section providing applicability.

Section 5: Amends s. 733.610, F.S., relating to sale, encumbrance, or transaction involving conflict of interest.

Section 6: Amends s. 733.617, F.S., relating to compensation of a personal representative.

Section 7: Amends s. 736.0708, F.S., relating to compensation of trustee.

Section 8: Provides an effective date of October 1, 2019, except as otherwise provided.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

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.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES