

## **CS/CS/HB 1237 — Probate Procedures**

by Criminal and Civil Justice Policy Council; Civil Justice and Courts Policy Committee; and Rep. Hukill (CS/CS/SB 1544 by Banking and Insurance Committee; Judiciary Committee; and Senators Joyner and Wilson)

This bill makes substantial changes to the Florida Probate Code and related laws.

### ***Safe-Deposit Boxes***

The bill requires a lessor (e.g., a financial institution) to make a complete copy of any document removed from a safe-deposit box and to place the copy, along with a memorandum of delivery identifying the name of the officer, the person to whom the document was delivered, the purported relationship of the person to whom the document was delivered, and the date of delivery, in the safe-deposit box leased by the decedent. This ensures that the personal representative has an accurate record of everything in the safe-deposit box when the decedent died.

### ***Notice of Probate Proceedings***

The bill defines formal and informal notice for purposes of the Florida Probate Code, Florida Trust Code, and other sections of law. The bill eliminates the requirement that a copy of the will that is being offered for probate be attached to the formal notice of the petition for administration served on interested persons. Also, the bill limits jurisdiction over a person served by formal notice under the Florida Probate Code to only the person's interest in the estate or in the decedent's protected homestead.

Additionally, the bill authorizes the filing of a pre-death caveat by an interested person. However, a creditor may still only file a caveat after the person's death. The bill eliminates the requirement to include the following information in the caveat: the decedent's social security number, last known residence address, date of birth, and a statement of the interest of the caveator in the estate, and the name and specific residence address of the caveator. The bill provides that a pre-death caveat expires two years after filing.

### ***Devise, Descent, and Disclaimer of Homestead Property***

The bill authorizes a surviving spouse to elect to take an undivided one-half interest in homestead property as a tenant in common, rather than a life estate. The remaining undivided one-half interest vests in the decedent's descendants in being at the time of the decedent's death, per stirpes. The election to take an undivided one-half interest in the homestead must be made within six months after the decedent's death and during the surviving spouse's lifetime. In order to make an election, the appropriate party must file a notice of election containing the legal description of the homestead, as well as other statutorily defined language, in the official record books of the county or counties where the homestead property is located. If an election is not made, the bill provides that expenses relating to the ownership of the homestead are to be allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen. However, if an election is made, the expenses are to be allocated between the

surviving spouse and the descendants as tenants in common in proportion to their respective shares.

The bill also provides that if an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse's interest is disclaimed, the disclaimed interest shall pass in accordance with Florida's Uniform Disclaimer of Property Interests Act (ch. 739, F.S.).

### ***Lifetime Transfers of Homestead Property***

The bill provides that if the owner of homestead property transfers an interest in the property, including a transfer in trust, to one or more persons during the owner's lifetime, the transfer is not a devise and the interest transferred does not descend if the transferor fails to retain a power, held in any capacity, acting alone or in conjunction with any other person, to revoke or revest that interest in the transferor.

The bill defines the term "transfer in trust" and permits the owner of the homestead property to retain the power to alter the beneficial use and enjoyment by any one or more of the beneficiaries of the trust, as long as the power is not exercised in favor of the owner, the owner's creditors, the owner's estate, or the creditors of the owner's estate, or in a manner that would discharge a legal obligation of the owner.

The bill also provides that the transfer of an interest in homestead property under the proposed law may not be treated as a devise of that interest even if:

- The transferor retains a separate legal or equitable interest in the homestead property, directly or indirectly through a trust or other arrangement;
- The interest transferred does not become a possessory interest until a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, the death of the transferor; or
- The interest transferred is subject to divestment, expiration, or lapse upon a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, survival of the transferor.

### ***Spousal Rights Procured by Fraud, Duress, or Undue Influence***

The bill creates a new section of law that provides that a surviving spouse found to have procured a marriage to the decedent by fraud, duress, or undue influence is not entitled to certain rights or benefits that inure solely by virtue of the marriage or the person's status as surviving spouse, unless the marriage is subsequently ratified. Specifically, the surviving spouse is not entitled to the following:

- Any rights or benefits under the Florida Probate Code, including entitlement to elective share or family allowance; preference in appointment as personal representative;

inheritance by intestacy, homestead, or exempt property; or inheritance as a pretermitted spouse.

- Any rights or benefits under a bond, life insurance policy, or other contractual arrangement if the decedent is the principal obligee or the person upon whose life the policy is issued, unless the surviving spouse is provided for by name in the bond, life insurance policy, or other contractual arrangement.
- Any rights or benefits under a will, trust, or power of appointment, unless the surviving spouse is provided for by name in the document.
- Any immunity from the presumption of undue influence that a surviving spouse may have under state law.

If the surviving spouse is found to have procured the marriage by fraud, duress, or undue influence, then any of the above rights or benefits that would have passed solely to the surviving spouse by virtue of the marriage shall pass as if the spouse has predeceased the decedent.

Any interested person may challenge a surviving spouse's rights by establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence. If the surviving spouse raises ratification as a defense, the spouse has the burden of establishing, by a preponderance of the evidence, the subsequent ratification by both parties.

Finally, the bill provides that an insurance company, financial institution, or other obligor that makes a payment according to the terms of its policy or obligations will not be held liable for making payments to the surviving spouse, unless prior to the payment it received written notice of the challenge.

### ***Judiciary Construction of a Will with Federal Tax Provisions***

The bill creates a means for judicial construction of a will that includes federal tax provisions. Specifically, if a will contains a formula-based distribution where the formula is based on federal tax provisions, and the personal representative or a beneficiary applies, the court may construe the terms of the will to reflect the testator's probable intent. In determining probable intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts the apparent plain meaning of the will.

The personal representative is authorized to delay or refrain from making any distribution, without being subject to liability, while the court determines the testator's intent.

The bill provides that it applies retroactively to January 1, 2010, which is the date upon which the suspension of the federal estate and federal generation-skipping transfer taxes took effect.

### ***Guardianship***

The bill permits a plenary guardian of property, or a limited guardian of property within the powers granted to it by the court, to seek approval to make an election in accordance with s. 732.401, F.S., which relates to descent of the homestead.

### ***Other Provisions***

The bill provides that in a hearing contesting the validity of a will, a self-proving affidavit of the will, or oath of an attesting witness, is admissible and is prima facie proof of the formal execution and attestation of the will.

The bill also provides that the laws for determining paternity and relationships for purposes of intestate succession apply to determine whether class gift terminology and terms of relationship in wills and trusts include adopted persons and persons born out-of-wedlock.

If approved by the Governor, these provisions take effect October 1, 2010, except as otherwise expressly provided in the bill.

*Vote: Senate 38-0; House 109-0*