

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice & Claims Subcommittee		MacNamara	Bond
1) Agriculture & Property Rights Subcommittee			
2) Judiciary Committee			

### SUMMARY ANALYSIS

Surviving spouses have a right to elect a share of the deceased spouse's estate, different than the spouse would have received under a will, known as the elective share. The amount of the estate a surviving spouse is entitled to is 30% of the value of the decedent's assets at the time of death. Current law provides which assets are included in determining the value of a decedent's elective estate as well as procedural requirements a surviving spouse must follow in order to claim the elective share.

The state's Constitution provides protection for certain property referred to as a homestead. One protection provided for homestead property is a restriction on a homestead owner from alienating or devising the homestead property. Where a homestead owner has a spouse, the homestead property passes to the spouse upon the death of the homestead owner in certain situations. Homestead property is currently excluded in determining the value of a decedent's elective estate, and is thus not included when calculating a surviving spouse's elective share.

The bill includes the protected homestead in the elective estate, except where a wife validly waives her rights to the property, and provides a method of valuation for purposes of satisfying the elective share.

The bill assesses interest against persons who are delinquent in fulfilling their obligations to pay or contribute towards satisfaction of the elective share and creates 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.

Lastly, the bill 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:

##### **Background: Homestead and the Elective Share**

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 statute. There are two significant exceptions to these general rules:

- 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
- Exempt property and homestead property transfer to certain surviving dependents.

Under current law, a homestead is not a property interest but is simply a constitutionally defined status. Article X, s. 4(a)(1) of the Florida Constitution provides a homestead exemption for certain property owned by "natural persons." The status of homestead which the constitution impresses on property under certain circumstances does not change the nature of the estate in the property owned by a homesteader residing in Florida, nor does the acquisition of homestead status confer any additional property interest or rights in property. Rather, the exemption merely exempts such property from certain liabilities to which it would otherwise be subject.

Specifically, the homestead is protected in three different ways: It provides the homestead with an exemption from taxes; it protects the homestead from forced sale by creditors; and it places certain restrictions on a homestead owner from alienating or devising the homestead property. Section 731.201(33), F.S., defines "protected homestead" as:

[T]he 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. For the purposes of the code, real property owned as tenants by the entirety is not protected homestead.

Three requirements must be satisfied for real property to be impressed with the characteristics of homestead property under the Florida Constitution: (1) the property must be owned by a "natural person"; (2) the owner must have made, or intend to make, the real property his or her permanent residence or that of his family; and (3) the property must meet certain size and contiguity requirements.

Homestead property owned by the decedent in either a joint tenancy with rights of survivorship or tenancy by the entireties is not protected homestead as the decedent's interest in the homestead property terminates at death.<sup>1</sup> Current 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

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<sup>1</sup> s. 732.401(5), F.S.  
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undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

The right of election pursuant to s. 732.401(2), F.S., 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 shall 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 shall 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>2</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>3</sup>

With respect to the elective share, the Legislature has specifically provided that, barring express waiver by a surviving spouse, a married person cannot deprive a surviving spouse of all or most of the interests in his or her estate through his or her will. Under such circumstances, when inadequate provisions are made for the surviving spouse, the spouse is given certain inheritance rights by statute; the surviving spouse may choose the greater of what was provided in the will or what the elective share statutes provide.

Specifically, the surviving spouse of a person who dies domiciled in Florida has the right to elect to take a share of the estate of the decedent, known as the elective share,<sup>4</sup> instead of the share of the estate provided in the will. The elective share is for the express purpose of caring for the surviving spouse.<sup>5</sup>

Florida'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 bill amends portions of the Florida Probate Code pertaining to the treatment of homestead property as it relates to the elective share, the rights and procedural requirements of a surviving spouse taking an elective share, and provides for interest and attorney fees and costs for certain situations arising out of elective share related proceedings.

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

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

<sup>4</sup> s. 732.201, F.S.

<sup>5</sup> *In re Anderson's Estate*, 394 So.2d 1146 (Fla. 4th DCA 1981).

## Current Law and Effect of Proposed Changes

### 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 elective share is paid outright to the surviving spouse and is awarded only to the extent that the value of other assets that pass from the decedent to the surviving spouse as a part of the decedent's overall testamentary plan do not rise above the requisite 30% level.

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.

Except as provided in s. 732.2135(2), F.S., this election is to be filed on or before the earlier of the date that is six months after the date of service of a copy of the notice of administration on the surviving spouse, or 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>

Within the period provided in s. 732.2135(1), F.S., the surviving spouse, attorney in fact or guardian of the property of the surviving spouse may petition the court for an extension of time for making 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 provides that a surviving spouse, or attorney in fact, or guardian of the property, may petition the court for an extension of time for making an election. In addition to the period of time in s. 732.2135(1), F.S., the parties may petition the court for an extension:

- 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., if later than the time specified in subsection (1);
- But no more than 2 years after the decedent's death.

### Elective Estate

As discussed above, the elective share for a surviving spouse is statutorily set at 30% of the elective estate.<sup>10</sup> 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 prior to the marriage). The elective share is in addition to the spouse's right to exempt property, a family allowance, and homestead.<sup>11</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>12</sup> The petition is to contain:

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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> s. 732.2065, F.S.

<sup>11</sup> s. 732.2105, F.S.

<sup>12</sup> Fla. Prob. R. 5.360(c).

- 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 that is 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;
- 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.

The bill includes the protected homestead in the value of the elective estate. Additionally, the bill provides rules governing the valuation of the interest in the protected homestead that the surviving spouse receives as part of his or hers elective share. Specifically, the bill provides that the value of the protected homestead is:

- The fair market value<sup>13</sup> 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 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.

### Contribution and Attorney Fees

Contribution means the remaining unsatisfied balance of the trust or the estate at the time of the distribution.<sup>14</sup> Any order of contribution and the resulting personal representative's duty to collect contribution is controlled by s. 732.2145, F.S.

<sup>13</sup> The bill provides a definition for fair market value for purposes of s. 732.2055, F.S., 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." HB 267, lines 234-239.

<sup>14</sup> See s. 732.2085, F.S.

Outstanding contributions bear interest at the statutory rate beginning 90 days after the order of contribution. The court's order of contribution is prima facie correct in proceedings in any court or jurisdiction.<sup>15</sup> Except as provided in s. 732.2145(3), F.S., the personal representative is required to collect contribution from the recipients' of the elective share as provided in the court's order of contribution.<sup>16</sup> If there is property within the possession or control of the personal representative that is distributable to a beneficiary or trustee who is required to contribute in satisfaction of the elective share, the personal representative must withhold the contribution required of the beneficiary or trustee from distribution.

If, after the order of contribution, the personal representative brings an action to collect contribution from property that is not within the personal representative's control, the judgment rendered shall include the personal representative's costs and reasonable attorney's fees.<sup>17</sup> The personal representative does not have to seek collection of any portion of the elective share from property not within the control of the personal representative until after the entry of the order of contribution. A personal representative who has the duty, under s. 732.2145, F.S., of enforcing contribution may be relieved of that duty by an order of the court finding that it is impracticable to enforce contribution in view of the improbability of collection under any judgment that might be obtained or otherwise.<sup>18</sup>

Nothing in s. 732.2145, F.S., relating to the order of contribution, limits the independent right of the surviving spouse to collect the elective share as provided in the court's order of contribution.<sup>19</sup> In fact, that right is specifically conferred by s. 732.2145(4), F.S. If the surviving spouse brings an action to enforce the order, the judgment must include the surviving spouse's reasonable attorney fees and costs.<sup>20</sup>

The bill also provides that direct recipients and beneficiaries who are required to make a contribution payment to the surviving spouse of some portion of the elective share are responsible for the interest on any unsatisfied amount after two years following the death of the decedent. The interest is in addition to interest accruing on unsatisfied contributions beginning 90 days after an order of contribution is entered. This payment of interest is calculated using the statutory rate allowed by Florida law.

Additionally, 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 ss. 733.609, 732.615, 732.616 and 736.1004, F.S., applicable to surcharge actions and proceedings to modify a will or trust. A court may direct payment from the estate or from a party's interest in the elective share or the elective estate, or may enter a judgment that can be satisfied from other property of the party.

### *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. 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 as often annually;

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<sup>15</sup> s. 732.2145(1), F.S.

<sup>16</sup> s. 732.2145(2), F.S.

<sup>17</sup> s. 732.2145(2)(b), F.S.

<sup>18</sup> s. 732.2145(3), F.S.

<sup>19</sup> s. 732.2145(4), F.S.

<sup>20</sup> *Id.*

- 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 Section 738.606, Fla. Stat.), 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 so productive.

Because not all elective share trusts will also be made subject to a marital deduction election, the bill specifically extends the savings provision of this 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.

#### 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

n/a