

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 733 Probate

**SPONSOR(S):** Kiar

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 988

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N	Caridad	Bond
2) Judiciary Committee			

### SUMMARY ANALYSIS

The Florida Constitution provides a homestead exemption for certain property owned by "natural persons." The exemption protects the property owner and the property owner's family from creditors and financial misfortune. It also restricts the property owner's ability to devise homestead property to anyone other than the surviving spouse or dependent children.

The bill:

- Revises the definition for "protected homestead" to provide that real property owned in tenancy by the entirety or in joint tenancy with right of survivorship is not protected homestead;
- Clarifies language in ss. 2 and 14 of chapter 2011-183, Laws of Florida, relating to a surviving spouse's elective share;
- Clarifies the time period in which an attorney-in-fact or guardian must file a petition for authority to make an election to take a tenancy in common interest in a homestead; and
- Bars inheritance through intestate succession of a natural or adoptive parent from or through a child for whom their parental rights have previously been terminated.

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

Probate is the process for marshalling the assets of a deceased person, paying debts, and distributing 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. Exempt property and homestead property transfer to certain surviving dependents before such property is subject to being sold to pay creditors; in addition, the elective share provisions may provide a different inheritance for a surviving spouse than the spouse would otherwise receive by operation of the will and of probate law.

##### Protected Homestead

Homestead is a house, outbuildings and adjoining land owned and occupied by a person or a family as a residence.<sup>1</sup> Article X, s. 4(a)(1) of the Florida Constitution provides a homestead exemption for certain property owned by "natural persons." The exemption protects the property owner and the property owner's family from creditors and financial misfortune. It also restricts the property owner's ability to devise homestead property to anyone other than the surviving spouse or dependent children. However, the constitution provides that this constraint does not apply to property held in tenancy by the entirety<sup>2</sup> or if the property owner is unmarried and has no minor children.

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 purposes of the code, real property owned as tenants by the entirety is not protected homestead.

Case law provides that homestead owned by the decedent and another individual in joint tenancy with rights of survivorship is not subject to the restrictions on devise.<sup>3</sup>

The term "protected homestead" is found in the following statutory sections:

- Section 409.9101 – Recovery of payments made on behalf of Medicaid-eligible persons (Medicaid Estate Recovery Act);
- Section 731.201 – General definitions (The Florida Probate Code);
- Section 732.2045 – Exclusions and overlapping application;
- Section 732.402 – Exempt property;
- Section 732.403 – Family allowance;
- Section 733.607 – Possession of estate;
- Section 733.608 – General power of personal representative;
- Section 733.617 – Compensation of personal representative;
- Section 733.6171 – Compensation of attorney for the personal representative; and
- Section 733.817 – Apportionment of estate taxes.

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<sup>1</sup> Black's Law Dictionary (9th ed. 2009).

<sup>2</sup> A tenancy by the entirety is a form of real estate ownership that may only be held by a legally married couple. Upon the death of one spouse, full ownership of the property immediately vests in the other spouse by operation of law. Tenancy by the entirety is presumed if the deed simply identifies the owners as "husband and wife." See Black's Law Dictionary (9th ed. 2009).

<sup>3</sup> See *Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d DCA 1984); see also *Marger v. De Rosa*, 57 So. 3d 866 (Fla. 2d DCA 2011).

The following statutes specifically reference Article X, section 4 for situations where the owner has died, but the term “homestead” is not qualified by the word “protected.”

- Section 732.227 – Homestead Defined (Florida Uniform Disposition of Community Property Rights at Death Act);
- Section 732.401 – Descent of Homestead;
- Section 732.401 – Devise of Homestead; and
- Section 739.203 – Disclaimer of rights of property held as tenancy by the entirety.

The Florida Supreme Court has recognized that various types of real estate ownership may qualify for homestead protection and in 1941 stated:

The Constitution limits the homestead land area that may be exempted, but it does not define or limit the estates in land to which homestead exemption may apply; therefore, in the absence of controlling provisions or principals of law to the contrary, the exemptions allowed by section 1, article 10 [now Article X, Section 4], may attach to any estate in land owned by the head of a family residing in this state, whether it is a freehold or less estate, if the land does not exceed the designated area and it is in fact the family home place. When the estate or interest of the owner in the homestead land terminates, the homestead exemption of such owner therein necessarily ceases.<sup>4</sup>

An owner's interest in tenancy by the entireties or joint tenancy with rights of survivorship may qualify for the protection against creditor's claims during the lifetime of the owners, and may also be subject to restrictions on the alienation of homestead during the owners' lifetime.

This bill clarifies that 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. The bill will not change the current law but is rather designed to eliminate any confusion caused by the omission of the reference to homestead property in a joint tenancy with rights of survivorship in the exemptions from definition of “protected homestead.”

### Descent of Homestead

Current law at s. 732.401(1) and (2), F.S., addresses 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.

The right of election pursuant to s. 732.401(2), F.S., may be exercised by 1) the surviving spouse or 2) 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:

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<sup>4</sup> *Coleman v. Williams*, 146 Fla. 45, 200 So. 207 (Fla. 1941).

- 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 or guardian of the property for approval to make the election tolls the time for making the election until 6 months after the decedent's death or 30 days after the rendition of an order authorizing the election, whichever occurs last;
- Once made, the election is irrevocable;
- 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. The statute contains language to include in the notice.

The bill eliminates the provision tolling the time for making the election where a petition by an attorney or guardian of the property for approval to make the election is filed. Instead, the petition for approval to make the election must be filed within 6 months after the decedent's death and during the surviving spouse's lifetime. In addition, 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.

### Termination of Parental Rights

A court may terminate parental rights where a party files a petition for termination of parental rights; certain requirements, such as providing notice to relevant parties, are met; and the court's order specifies one of the grounds for termination listed in s. 39.806, F.S. Currently, there is no provision prohibiting a parent whose parental rights have been terminated from later inheriting through intestate succession. The bill creates s. 732.1081, F.S., barring inheritance through intestate succession of a natural or adoptive parent from or through a child for whom their parental rights have previously been terminated.

### Other Changes

In 2011, the Florida Legislature amended Florida Statutes s. 732.201, F.S., to increase the intestate share of the surviving spouse in certain circumstances. Section 14, ch. 2011-183, provides that "[e]xcept as otherwise expressly provided in this act, this act shall take effect upon becoming a law and shall apply to all proceedings pending before such date and all cases commenced on or after the effective date." Section 2, ch. 2011-183 provides for an effective date of October 1, 2011 for the changes to s. 732.201, F.S. However, the language of s. 2 does not address the application of the amended statutes to estates pending or filed on or after October 1, 2011 for decedent's dying before October 1, 2011.

The bill clarifies language in ss. 2 and 14 of chapter 2011-183, Laws of Florida, relating to a surviving spouse's elective share. Specifically, the bill provides that s. 2 of the act applies only to the estates of decedents dying on or after October 1, 2011.

### B. SECTION DIRECTORY:

Section 1 amends s. 731.201, F.S., relating to definitions.

Section 2 amends s. 732.102, F.S., relating to spouse's share of intestate estate.

Section 3 amends s. 732.401, F.S., relating to descent of homestead.

Section 4 creates s. 732.1081, F.S., relating to termination of parental rights.

Section 5 provides that the act shall take effect upon becoming law.

## 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 revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state 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 does not appear to have any direct economic impact on the private sector.

### 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:

Under some circumstances, retroactive application of civil legislation may violate the state constitution by impairing a vested right, creating a new obligation, or imposing a new penalty.<sup>5</sup> Courts apply a two-pronged test to determine whether retroactive application of a statute violates the constitution. "First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles."<sup>6</sup>

The bill provides that amendments to 732.102, F.S., apply only to the estates of decedents dying on or after October 1, 2011. It appears that this provision preserves an existing right and therefore does not implicate the constitution.

### B. RULE-MAKING AUTHORITY:

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

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<sup>5</sup> See *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla.1995)

<sup>6</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873, 877 (Fla. 2010)

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.