

## HB 1237 Section 3

### WHITE PAPER Proposed Revisions to §731.110, Florida Statutes

#### I. SUMMARY

The purpose of the proposed amendment to §731.110 of the Florida Statutes is to clarify the right of an interested person, other than a creditor, to file a caveat before the death of an individual. In addition, the amendment removes inconsistencies between the statute and Fla. Prob. R. 5.260. There is no change to the substantive rights of a creditor or interested person to file a post-death caveat.

#### II. CURRENT SITUATION

Upon the current law, an interested person may file a petition for administration to obtain the appointment of a personal representative and have the decedent's last will and testament admitted to probate with no notice to the potential interested persons unless a caveat has been previously filed pursuant to §731.110, Florida Statutes and Fla. Prob. R. 5.260. This can place the nominated personal representative at a significant advantage, especially if undue influence by that individual is suspected by interested persons. If a person is "apprehensive that an estate, either testate or intestate, will be administered or that a will may be admitted to probate without that person's knowledge", that person may file a caveat with the court. *F.S. §731.110 (2009)*. It is often difficult for interested persons to know when an individual is deceased. Where undue influence is being practiced upon an individual, the individual is often isolated from family members and the undue influencer is the only person with information regarding the health of the decedent. If information is available, it often creates a race to the court house to get the caveat filed before the petition for administration.

Many attorneys routinely file pre-death caveats. Others have reported that the clerks of court in their circuit refuse to accept such filings. Neither the rule or statute appear to specifically prohibit the filing of a caveat if the person is not then deceased. However, the statute and rule both reference the content of a caveat in relation to a "decedent" and his or her "estate. In light of the above, the committee felt the language of the statute and rule was unclear.

In addition, the current statute contains procedural aspects that are in conflict with the procedure contained in the corresponding Fla. Prob. R. 5.260. In particular, the statute requires the designation of a Resident Agent if the caveator is not a resident of the county in which the caveat is filed. The rule, however, only requires the designation of a resident agent if the caveator is not a resident of the state of Florida. Finally, the rule further provides that a designation of a resident agent is

not necessary if the caveator is represented by an attorney admitted to practice in Florida who signs the caveat. There is no corresponding exception in the statute.

### III. EFFECT OF PROPOSED CHANGE GENERALLY

The proposed change would permit the filing of a pre-death caveat by an interested person. So as to limit the burden placed upon the Clerk of Court to monitor pre-death caveats, the proposed change would provide that such caveats shall expire two (2) years after filing. The amendment would also exclude the filing of pre-death caveats by creditors of the decedent as the committee did not feel the appointment of a personal representative or the admittance of a potentially invalid will substantially affected the rights of creditors in an estate. The right of a creditor to file a post death caveat is not affected by this amendment. Finally, the amendment would also eliminate the inconsistencies between F.S. §731. 110 and Fla. Prob. R. 5.260, bringing the statute in line with the procedural requirements of the rule.

### IV. ANALYSIS

One of the primary purposes of F. S. §731.110 is to permit an interested person to require notice be served upon them and that they be permitted an opportunity to object to a petition for administration before a personal representative is appointed or the decedent's purported last will and testament is admitted to probate. If the interested person is denied information regarding the death of the decedent, the purpose of the statute is defeated if the interested person is not permitted to file a caveat until after the death of the decedent. The clarification that pre-death caveats are permitted to be filed by interested persons assures that wrongdoers may not isolated individuals from their family and then obtain the appointment as personal representative or have a potentially invalid will admitted to probate without the interested person having any ability to require prior notice. The amendment also resolves the present inconsistency between the circuits in the interpretation of the present statute by the clerks of court regarding the acceptance of pre-death caveats. Finally, the amendment will limit the impact on the clerks of court by providing that the caveat will expire two years after filing. It would be the responsibility of the caveator to docket the pre-death caveat for re-filing or renewal at the termination of the two year period.

The amendment also eliminates the inconsistency in procedural aspects between the statute and relevant rule and brings the statute in line with the rule.

- V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS – None.
- VI. DIRECT IMPACT ON PRIVATE SECTOR – None.
- VII. CONSTITUTIONAL ISSUES – None apparent.
- VIII. OTHER INTERESTED PARTIES – Clerks of Court