The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 1544
INTRODUCER:	Judiciary Committee and Senator Joyner
SUBJECT:	Probate Procedures
DATE:	March 29, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	**Fav/CS**
2.			BI	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

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

- Requires the lessor of a safe-deposit box to make a complete copy of any document removed and delivered to certain statutorily defined individuals after the death of the lessee of the box;
- Authorizes the filing of a caveat by any interested person before the death of an individual;
- Authorizes a surviving spouse to take a one-half tenancy in common, rather than a life estate, if the decedent's homestead property is not devised as authorized by law or the Florida Constitution;
- Provides that a surviving spouse may disclaim the transfer of homestead property;
- Clarifies existing law to provide guidance as to what types of lifetime transfers are permissible under the Florida Constitution and statutory law;
- Provides that the laws used to determine paternity apply when determining whether adopted persons and persons born out-of-wedlock are included in class gift terminology and terms of relationship;

- Provides that, unless subsequently ratified, a marriage between a surviving spouse and the decedent which was procured by fraud, duress, or undue influence does not entitle the surviving spouse to certain rights and benefits related to the distribution of the estate solely by virtue of the marriage;
- Allows a court to modify the distribution under a will where the will erroneously includes estate tax-related formulas;
- 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;
- Defines formal and informal notice for purposes of the Florida Probate Code, Florida Trust Code, and other sections of law; and
- Makes technical and conforming changes.

This bill substantially amends the following sections of the Florida Statutes: 655.934, 655.935, 731.110, 731.201, 731.301, 732.2125, 732.401, 732.4015, 732.608, 733.107, 733.2123, 733.608, 735.203, 736.1102, and 744.444. The bill creates the following sections of the Florida Statutes: 732.4017, 732.805, and 733.1051.

II. Present Situation:[1]

Safe-Deposit Boxes

A safe-deposit box is defined as "a safe-deposit box, vault, or other safe-deposit receptacle maintained by a lessor, and the rules relating thereto apply to property or documents kept in safekeeping in the financial institution's vault."[2] Individuals use safe-deposit boxes to protect valuable items and papers from theft or destruction. Documents commonly retained in safe-deposit boxes are original wills, life insurance policies, deeds to burial plots, and other documents relating to ownership of assets.

Currently, upon proof of death to the lessor (*e.g.*, a financial institution) of a safe-deposit box, a person named in a court order or the spouse, parent, adult descendant, or personal representative may open and examine the contents of a safe-deposit box leased or co-leased by a decedent.[3] If requested, the lessor shall deliver:

- Any writing purporting to be a will of the decedent, to the court having probate jurisdiction;
- Any writing purporting to be a deed to a burial plot or to give burial instructions, to the person making the request for the search;
- Any document purporting to be an insurance policy on the life of the decedent, to the beneficiary named therein.[4]

[1] The information contained in the Present Situation of this bill analysis is primarily derived from the White Papers from the Real Property, Probate, and Trust Law Section of The Florida Bar.
[2] Section 655.93, F.S.
[3] Section 655.935, F.S. If a lessor deals with the lessee's agent in accordance with a written power of attorney or a durable family power of attorney signed by the lessee, the transaction will bind the lessee's estate. Section 655.934, F.S.
[4] Section 655.935, F.S.

The right to open and examine the contents of a safe-deposit box leased by a decedent is not considered to be the "initial opening" of the safe-deposit box under the Florida Probate Code (Code). The Code requires that the "initial opening" of a safe-deposit box leased by a decedent be opened by two of the following persons: an employee of the institution where the box is located, the personal representative, or the personal representative's attorney of record. Each person present at the opening must sign an inventory of the contents of the box, under penalty of perjury, and the inventory must be filed with the court.[5]

Section 655.935, F.S., does not require that the lessor retain an inventory or other record of the documents that are allowed to be removed from the safe-deposit box. The purpose of s. 655.935, F.S., is to allow family members and personal representatives to gain access to specified information in the safe-deposit box in order to finalize funeral arrangements. In most instances, the funeral takes place before a probate administration is initiated. Accordingly, if the lessor delivers the will, deed to a burial plot or burial instructions, or an insurance policy without retaining an inventory, as allowed under current law, when the personal representative accomplishes an "initial opening," he or she may not know that certain documents are missing.

Notice of Probate Proceedings

There are two basic forms of notice under the Code: formal and informal. Formal notice requires delivery of a copy of the initial pleading seeking relief and documentation notifying the recipient that he or she has 20 days to reply and if a response is not received in that time frame, that it may result in a judgment or order for the relief demanded in the pleading.[6] Formal notice may be made by certified mail, return receipt required, as well as any other method allowed under the Florida Rules of Civil Procedure or Florida law. When informal notice of a petition or proceeding is required, it is served by delivering or mailing a copy of the paper to the attorney or interested person at the last known address or, if no address is known, leaving it with the clerk of the court.[7]

Section 731.301, F.S., provides that formal notice is sufficient to establish jurisdiction over the person served to the extent the person has an interest in the decedent's estate.

Additionally, the Code allows any person who is apprehensive that an estate will be administered or that a will may be admitted to probate without that person's knowledge to file a caveat with the court. A "caveat" is defined as "[a] formal notice or warning given by a party to a court or court officer requesting a suspension of proceedings."[8] However, sometimes a person may not know that an individual is deceased and is not able to file a caveat prior to the petition for administration. According to the Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL or section), attorneys often try to file pre-death caveats, but some clerks of court in their circuit refuse to accept the filings.[9] Neither the Probate Rules nor the Code specifically

[5] Section 733.6065, F.S.
[6] Fla. Prob. R. 5.040(a).
[7] Fla. Prob. R. 5.041(b).
[8] BLACK'S LAW DICTIONARY 89 (2d pocket ed. 1996).
[9] Real Property, Probate, and Trust Law Section, The Florida Bar, *White Paper: Proposed Revisions to §731.110, Florida Statutes* (on file with the Senate Committee on Judiciary).

prohibits the filing of a caveat if the person is not yet deceased; however, both the Code and the rules reference the content of a caveat in relation to a "decedent" and his or her "estate."

Devise, Descent, and Disclaimer of Homestead Property

The Florida Constitution places restrictions on the devise of homestead property, which are designed to protect surviving spouses and minor children. Specifically, article X, section 4 provides, in part:

> The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child.

Additionally, s. 732.4015, F.S., provides that "the homestead shall not be subject to devise[10] if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children." The constitution, however, does not provide how the property descends upon the death of the owner of the homestead. Section 732.401, F.S., provides that if the owner of homestead property attempts to devise the property in a manner not permitted by the constitution or law, then ownership descends the same as other intestate property. However, if the decedent is survived by a spouse and one or more descendants, the surviving spouse gets a life estate[11] in the homestead, with a vested remainder[12] to the descendents in being at the time of the decedent's death per stirpes.[13] In recent years, Florida's homestead laws have actually created a burden on surviving spouses and descendants because of increasing taxes, insurance costs, assessments, and property upkeep to the point that some people feel trapped in their homestead property.[14] As a result, some people have attempted to disclaim the property to avoid the application of s. 732.401, F.S.

Chapter 739, F.S., the Florida Uniform Disclaimer of Property Interests Act, allows a person to disclaim property the person is supposed to inherit. A disclaimer must be in writing, describe the interest or power disclaimed, and be signed by the person making the disclaimer and be witnessed.[15] If a person files a disclaimer that does not provide for the disposition of the interest, then the interest passes as if the disclaimant died immediately before the interest was created (*i.e.*, the interest passes to the person who would have inherited the property if the person disclaiming had not survived the decedent).[16]

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[10] Section 731.201(10), F.S., defines "devise" when used as a noun as "a testamentary disposition of real or personal property." If the term is used as a verb it means "to dispose of real or personal property by will or trust." Also, s. 732.4015, F.S., provides the following definition of devise: "a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead."

[11] A life estate is "not inheritable, and therefore endures only so long as the holder of estate lives." Roger Bernhardt and Ann M. Burkhart, *Property*, 74 (3d ed. 1983).

[12] A vested remainder is when a future interested is created in an ascertained person and is subject to no condition precedent, which is to take after the natural termination of a preceding estate. *Id*. at 81-82.

[13] Per stirpes means "[p]roportionately divided among beneficiaries according to their deceased ancestor's share." BLACK'S LAW DICTIONARY 526 (2d pocket ed. 1996).

[14] Jeffrey A. Baskies, *The New Homestead Trap: Surviving Spouses are Trapped by Life Estates They No Longer Want or Can Afford*, 81 FLA. BAR J. 69 (June 2007).

[15] Section 739.104(3), F.S.

[16] Section 739.201(3), F.S.

Florida courts have reached inconsistent results in deciding whether a disclaimer may be used to get around a surviving spouse or lineal descendent having to take unwanted homestead property. Several courts have held that where homestead property was invalidly devised, a post-death disclaimer of the surviving spouse's life estate in the property did not divest the decedent's descendants of their vested remainder interests.[17] At least one circuit court has reached an opposite result under similar facts, holding that the spouse's disclaimer would divest the decedent's descendants of their interests and give effect to the otherwise invalid devise.[18]

Lifetime Transfers of Homestead Property

Article X, section 4(c) of the Florida Constitution expressly permits the owner of homestead real estate, joined by the owner's spouse, to alienate homestead property by mortgage, sale, or gift. According to RPPTL:

> Two Florida appellate cases have invalidated attempted dispositions of homestead property made by lifetime conveyances in which the transferors retained certain rights in the homestead real property either by deed or by trust. (Citations omitted.) Although in each case the trust or deed terms provided for a specific disposition of the homestead property upon the settlor's death, the settlor retained the right during lifetime to direct a conveyance of the title and the entire beneficial interest to other persons (including the settlor) at the settlor's pleasure. Thus the interest in the homestead property that was conveyed was not a vested right in the property to any of the beneficiaries named in the trust instrument, but was a contingent interest subject to the right of the settlor to direct the trustee to convey the property to others during the settlor's lifetime. Because of the retention of the entire beneficial estate in the settlor during life, in each case the trust instrument was in effect an attempted testamentary disposition of homestead property in contravention of the restrictions set for in the Florida constitution.
>
> Based on these two seminal cases, practitioners in this area, including title companies and attorneys engaged in estate planning, are not certain as to what the courts of this state will hold regarding certain types of lifetime transfers which the drafters of the proposed statute believe are permissible under the Florida Constitution and Florida statutory law.[19]

Spousal Rights Procured by Fraud, Duress, or Undue Influence

A surviving spouse is entitled to significant financial benefits under Florida law, including rights in homestead property, elective share rights, the right to take as a pretermitted spouse, and priority in preference during the selection of decedent's personal representative.

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[17] *See In re: Estate of Joseph T. Ryerson, Jr.*, No. 93-307 (Fla. 15th Cir. Ct. 1993), *aff'd, per curium*, No. 93-2074 (Fla. 4th DCA 1994); *In re: Estate of Frances N. Janien*, 12 Fla. L. Weekly Supp. 221 (2005).

[18] *See In re: Estate of Harry Sudakoff*, No. 91-87 (Fla. 12the Cir. Ct. 1994), *aff'd, per curium*, No. 94-02102 (Fla. 2d DCA 1995).

[19] Real Property, Probate, and Trust Law Section, The Florida Bar, *White Paper: Proposed §732.4017, Fla. Stat.* (on file with the Senate Committee on Judiciary) [hereinafter White Paper for s. 732.4017, F.S.].

Under current law, a marriage can be set aside by a court if the marriage is either void or voidable. If it is possible, under any circumstances, for the parties to contract the marriage or subsequently to ratify it, the marriage is only voidable. A marriage is considered void if it is impossible to ratify it, or if a statute expressly declares that it is void.[20]

A marriage is void under Florida law if:

- It is a bigamous marriage (s. 826.01, F.S.);
- It is an incestuous marriage (ss. 741.21 and 826.04, F.S.);
- It is a marriage between persons of the same sex (s. 741.212, F.S.);
- It is a common law marriage entered into after January 1, 1968 (s. 741.211, F.S.);
- There is a prior existing marriage that is undissolved at the time the parties enter the marriage (*Smithers v. Smithers*, 765 So. 2d 117 (Fla. 4th DCA 2000)); or
- One or both parties lack the requisite mental capacity at the time of the marriage (*Kuehmsted v. Turnwall*, 138 So. 775 (Fla. 1932); *Bennett v. Bennett*, 26 So. 2d 650 (Fla. 1946)).

A marriage is voidable under Florida law if:

- Consent to the marriage was obtained by undue influence (*Amelle v. Fisher*, 647 So. 2d 1047 (Fla. 5th DCA 1994));
- Consent to the marriage was obtained by duress (*In re Ruff's Estate*, 32 So. 2d 840 (Fla. 1947); *Tyson v. State*, 90 So. 622 (Fla. 1922)); or
- Consent to the marriage was obtained by fraud (*Cooper v. Cooper*, 163 So. 35 (Fla. 1935)).

Florida case law has made it clear that an action challenging a marriage can be maintained after the death of the spouse only if the marriage is void.[21] A voidable marriage, however, may be attacked only in a direct proceeding during the life of the parties.[22] Upon the death of either party, a voidable marriage is deemed valid from the outset.[23] Consequently, a voidable marriage cannot be attacked after the death of either party to the marriage. The result is that a surviving spouse who procured a marriage by undue influence, duress, or fraud is still entitled to all of the legal benefits of a surviving spouse, and the surviving family members cannot challenge the marriage after the death of one of the parties to the marriage.

In an action challenging a marriage, a party seeking to uphold the marriage may prove ratification of the marriage. Ratification is any action upholding the validity of the marriage. For instance, a spouse may allege that his or her marriage is voidable because he or she was so intoxicated at the marriage ceremony that he or she could not have consented to the marriage. However, if that spouse subsequently cohabitates with the spouse and acts as if the marriage is

[20] 25 FLA. JUR 2D *Family Law* s. 40.
[21] *Kuehmsted v. Turnwall*, 138 So. 775, 777 (Fla. 1932).
[22] *Arnelle v. Fisher*, 647 So. 2d 1047, 1048 (Fla. 5th DCA 1994) (citing *Kuehmsted*, 138 So. At 777).
[23] *Id*.

valid, the spouse has ratified the marriage.[24] Similarly, if a spouse was defrauded into entering into a marriage and later learns of the fraud, but stays in the marriage and continues to act as if he or she is married despite knowledge of the fraud, the spouse has ratified the marriage.[25]

Judiciary Construction of a Will with Federal Tax Provisions[26]

Wills and trust agreements frequently contain provisions designed to eliminate, minimize, or defer payment of the federal estate tax and the federal generation-skipping transfer tax (GST tax). These provisions are usually phrased in terms of a formula intended to produce the optimal result under the law prevailing at the time for application of the formula (*e.g.*, the death of the testator).

In 2001, the federal government suspended the federal estate and GST taxes for 2010 only. The suspension of the federal estate and GST taxes for 2010 casts the interpretation of these tax-related formulas, and other provisions phased in terms of a desired tax outcome, in doubt. For example, a formula stated as "the maximum GST exemption" or "the maximum estate tax marital deduction" has no meaning because in 2010 there is no federal estate tax marital deduction or GST exemption.

Also, even if the tax provisions in the will were clear on their face, in many instances the result compelled by the plain language during the 2010 federal transfer tax hiatus will not be consistent with the settlor's or decedent's intent. For example, the formula "the most I can pass free from estate taxes at my death" can result in an unintended disinheriting of the surviving spouse if the decedent's children are to receive the formula amount (in 2010, everything) and the surviving spouse is to receive the balance (in 2010, nothing).

Section 732.6005, F.S., provides that the testator's intent controls over the legal effect of the testator's dispositions. This provision of law comes into play when there is some ambiguity between the testator's intent and the wording of the will. There is no current statutory provision in the Florida Probate Code and no clear precedent in common law that would allow a court to construe tax formulas and other provisions in wills to fulfill the testator's intent in light of the disruption brought to wills by the suspension of the federal estate and GST taxes in 2010. This is because there is no ambiguity – the will is clear on its face and appears consistent with what the testator intended at the time the will was drafted – so there are no grounds to get into court to review it. But because of the changes in the federal tax law, what is in the will may not actually be what the testator intended.[27]

[24] *Mahan v. Mahan*, 88 So. 2d 545 (Fla. 1956).
[25] *Ball v. Ball*, 36 So. 2d 172 (Fla. 1948).
[26] The information contained in this portion of the Present Situation of this bill analysis is derived from the Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on the Proposed Enactment of New Sections 733.1051 and 736.04114, Florida Statutes* (on file with the Senate Committee on Judiciary).
[27] E-mail from Martha Edenfield, Real Property, Probate, and Trust Law Section of The Florida Bar, to professional staff of the Senate Committee on Judiciary (Mar. 20, 2010) (on file with the Senate Committee on Judiciary).

Guardianship

Section 744.444, F.S., enumerates the powers that may be exercised by a guardian without obtaining a court order authorizing a specific power. Specifically, a guardian may:

- Retain assets owned by the ward;
- Receive assets from fiduciaries or other sources;
- Vote stocks or other securities in person or by general or limited proxy or not vote stocks or other securities;
- Insure the assets of the estate against damage, loss, and liability and insure himself or herself against liability as to third persons;
- Execute and deliver in his or her name as guardian any instrument necessary or proper to carry out and give effect to this section;
- Pay taxes and assessments on the ward's property;
- Pay valid encumbrances against the ward's property in accordance with their terms, but no prepayment may be made without prior court approval;
- Pay reasonable living expenses for the ward, taking into consideration the accustomed standard of living, age, health, and financial condition of the ward;
- Elect whether to dissent from a will under the provisions of s. 732.2125(2), F.S., or assert any other right or choice available to a surviving spouse in the administration of a decedent's estate;
- Deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements, money market mutual funds, or other prudent investments;
- Pay incidental expenses in the administration of the estate;
- Sell or exercise stock subscription or conversion rights and consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- When reasonably necessary, employ persons, including attorneys, auditors, investment advisers, care managers, or agents, even if they are associated with the guardian, to advise or assist the guardian in the performance of his or her duties;
- Execute and deliver in his or her name as guardian any instrument that is necessary or proper to carry out the orders of the court;
- Hold a security in the name of a nominee or in other form without disclosure of the interest of the ward, but the guardian is liable for any act of the nominee in connection with the security so held;
- Pay or reimburse costs incurred and reasonable fees or compensation to persons, including attorneys, employed by the guardian from the assets of the guardianship estate, subject to obtaining court approval of the annual accounting;
- Provide confidential information about a ward that is related to an investigation arising under part I of ch. 400, F.S., to a local or state ombudsman council member conducting such an investigation.

III. Effect of Proposed Changes:

Safe-Deposit Boxes (Sections 1 and 2)

This bill amends s. 655.935, F.S., to require 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 change corrects a common problem, so when the personal representative conducts and "initial opening," he or she has an accurate record of everything in the safe-deposit box when the decedent died.

The bill authorizes the lessor to charge reasonable fees to cover the costs incurred in producing the copy of the documents.

The bill also amends s. 655.934, F.S., to delete the reference to a "durable family power of attorney" and replace it with a "durable power of attorney."

Notice of Probate Proceedings (Sections 3, 4, 5, 14, 15, and 16)

The bill amends the definitions of "formal notice" and "informal notice" found in s. 731.201, F.S. Specifically, formal notice is amended to mean "a form of notice that is described in and served by a method of services provided under rule 5.040(a) of the Florida Probate Rules." The bill amends informal notice (or notice) to mean "a method of service for pleadings or papers as provided under rule 5.040(b) of the Florida Probate Rules."

Section 733.2123, F.S., is amended to eliminate 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 on interested persons.

The bill amends s. 731.301(2), F.S., to limit 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.

The bill makes conforming changes to ss. 733.608 and 735.203, F.S., regarding notice to be given in certain situations.

Additionally, the bill amends s. 731.110, F.S., to statutorily authorize 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 eliminates the inconsistencies between s. 731.110, F.S., and the Florida Probate Rules by requiring the caveator to designate a person residing in the county in which the caveat is filed as the agent of the caveator if the caveator is a nonresident and is not represented by an attorney licensed to practice in Florida. If the caveator is represented by an attorney, it is

not necessary to designate a resident agent. Finally, the bill provides that a pre-death caveat expires two years after filing.

Devise, Descent, and Disclaimer of Homestead Property (Sections 7 and 8)

Section 732.401, F.S., is amended to authorize 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 only persons authorized to exercise the right of election are the surviving spouse, an attorney in fact, or the guardian of the property of the surviving spouse. However, if the election is made by someone other than the surviving spouse, it must be approved by the court having jurisdiction over the property and, in making the determination, the court must determine whether the election is in the best interests of the surviving spouse.

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. A petition by an attorney in fact or the guardian of the property for approval to make the election tolls the time for making the election until six months after the decedent's death or 30 days after the rendition of an order authorizing the election, whichever is later. If an election is made, it is irrevocable.

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, in accordance with ch. 738, F.S.[28] 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 s. 732.401, F.S., does not apply to property that the decedent owned in tenancy by the entireties or joint tenancy with rights of survivorship.

Finally, the bill provides that if the surviving spouse disclaims his or her life estate pursuant to ch. 739, F.S.,[29] then the interests of the decedent's descendants may not be divested.

The bill amends s. 732.4015, F.S., to eliminate confusion in situations where a devise of homestead property to the surviving spouse is a valid devise. The bill 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 ch. 739, F.S. According to the Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL or section):

[28] Chapter 738, F.S., is the Florida Uniform Principal and Income Act.
[29] Chapter 739, F.S., is the Florida Uniform Disclaimer of Property Interests Act.

> If the devise of homestead to the spouse is valid, the decedent's descendants do not receive a vested remainder in the homestead at the moment of death. The surviving spouse's disclaimer of a valid devise . . . does not cut off any vested rights of the decedent's descendants under the constitution because they had none to start with. Further, because the spouse is the one disclaiming, the public policies behind the constitutional restrictions on devise are satisfied.[30]

Lifetime Transfers of Homestead Property (Section 9)

The bill creates s. 732.4017, F.S., to authorize inter vivos conveyances of an interest in homestead property without it being considered a devise if certain conditions are met. Specifically, 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" to mean "a trust under which the transferor of the homestead property, alone or in conjunction with another person, does not possess a right of revocation as that term is defined in s. 733.707(3)(e)." The bill "permits the owner of the homestead property to retain a power to alter the beneficial use and enjoyment by any one or more of the beneficiaries of the trust, as long as the power cannot be 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."[31] For example, an owner could exercise a power to exclude a child of the owner as a beneficiary or to change the ages specified for distributions, but the owner could not direct that distributions be made to the owner's spouse or to anyone else who is not a descendant 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, the death of the transferor.

[30] Real Property, Probate, and Trust Law Section, The Florida Bar, *White Paper: Proposed Amendments to §§ 732.401 and 732.4015, Fla. Stat.* (on file with the Senate Committee on Judiciary).
[31] White Paper for s. 732.4017, F.S., *supra* note 19.

Spousal Rights Procured by Fraud, Duress, or Undue Influence (Section 11)

The bill creates s. 732.805, F.S., which 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 bring a challenge to a surviving spouse's rights as a defense, objection, or cause of action. The contestant has the burden of 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. A challenge made under this section must be commenced within four years after the decedent's death, unless the claim is barred sooner by adjudication, estoppels, or a provision of the Florida Probate Code or Florida Probate Rules.

The bill provides that the court shall award taxable costs, including attorney's fees, in all actions under this section of law. The court may direct payment from a party's interest, if any, in the estate, or enter a judgment that may be satisfied from other property of the party, or both.

The bill does provide a protective measure for institutions making payments in good faith and without notice of the challenge to spousal rights. Specifically, 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 under this section. Notice must be given in writing and in a reasonable manner, such as first-class mail, personal delivery, delivery to the person's last known address, or a properly directed facsimile or other electronic means. The bill provides that notice to an insurance company or financial institution must contain the name, address, and taxpayer identification number, or account or policy number, of

the principal obligee or person whose life is insured. It must also be directed to an officer or a manager of the insurance company or financial institution in Florida. If the company or institution does not have an office in Florida, then the notice must be sent to the company's or institution's principal office. Generally, notice is effective when it is given; however, notice upon an insurance company or financial institution is not effective until five business days after it is given.

Finally, the bill provides that the rights and remedies provided for in this section are in addition to any other rights and remedies a person may have at law or equity.

Judiciary Construction of a Will with Federal Tax Provisions (Section 12)

The bill creates s. 733.1051, F.S., to create a means for judicial construction of a will that includes federal tax provisions. 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 bill provides that a personal representative who withholds distributions pending a determination under this new section of law is not liable to any beneficiary for damages related to the delay in distribution.

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

Guardianship (Section 18)

The bill amends s. 744.444, F.S., to permit 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.

Other Provisions (Sections 6, 10, 13, and 17)

Section 733.107, F.S., is amended to provide that in a hearing contesting the validity of a will, a self-proving affidavit of the will,[32] or oath of an attesting witness,[33] is admissible and is prima facie proof of the formal execution and attestation of the will. According to the Real Property, Probate, and Trust Law Section of The Florida Bar, this provision:

> [I]s not intended to and will not foreclose a will contestant from presenting evidence impeaching or contradicting the affidavit or otherwise presenting evidence that the will was not executed in compliance with Florida law. It simply

[32] A will must be signed by the testator and two witnesses to be valid. Section 732.503, F.S., provides that a notary may witness the signatures of the testator and the two witnesses and then sign a form acknowledging that the will was signed by the testator and witnesses in the presence of each other. This is known as "self-proof." A self-proved will may be admitted to probate without the oath of an attesting witness.

[33] If a notary was not present to complete a self-proof affidavit, then a person attempting to admit a will to probate must obtain an oath signed by one of the witnesses to the will certifying that the will was properly executed. Section 733.201(2), F.S.

has the effect of allowing the proponent to meet its initial burden of presenting prima facie evidence of due execution and attestation through a self proving affidavit or oath executed in compliance with Florida Statutes.[34]

The bill amends ss. 732.608 and 736.1102, F.S., to provide 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 included adopted persons and persons born out-of-wedlock.

The bill makes other technical changes.

Effective Date (Section 19)

Except as otherwise expressly provided in the bill and except for this section, which shall take effect upon becoming a law, the bill shall take effect October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article X, section 4 of the Florida Constitution prohibits the devise of homestead property when the decedent is survived by a spouse or minor child, but permits a devise to the surviving spouse if the decedent is not survived by a minor child. The descent of homestead property which cannot be devised, or which is the subject of an invalid devise, is controlled by Florida law and is not addressed in the constitution. Accordingly, the proposed changes do not appear to conflict with the Florida Constitution.[35]

Additionally, the bill provides that s. 733.1051, F.S., created by the bill, is remedial in nature and operates retroactively to January 1, 2010. Retroactive operation is disfavored by courts and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will

[34] Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper, Proposed Legislation Change Regarding Establishing Prima Facie Evidence in Will Contests* (on file with the Senate Committee on Judiciary).
[35] See Real Property, Probate, and Trust Law Section, The Florida Bar, *White Paper: Proposed Amendments to §§ 732.401 and 744.444, Fla. Stat.* (on file with the Senate Committee on Judiciary).

admit of no other construction."[36] The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was a person's right vested or inchoate?
- Is the application of the statute to these facts unconstitutionally retroactive?[37]

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.[38] It appears that the bill is remedial and does not create new statutory rights, duties, or obligations.

Additionally, the bill makes it clear that it is the Legislature's intent to apply the law retroactively. "Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively."[39] A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.[40] This bill does not appear to do any of these things.

Accordingly, the retroactive nature of the bill may survive a constitutional challenge.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill requires that lessors of safe-deposit boxes create a complete copy of any documents removed from a decedent's safe-deposit box, as well as an inventory of who took the documents. The bill may have a fiscal impact on these financial institutions; however, the bill allows the lessor to charge reasonable fees to the party seeking access to the box.

C. Government Sector Impact:

The bill creates s. 732.4017, F.S., to allow for an inter vivos conveyance of an interest in homestead property without it being considered a devise. According to the Real Property,

[36] Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).
[37] *Weingrad v. Miles*, 2010 WL 711801, *2 (Fla. 3d DCA 2010) (internal citations omitted).
[38] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[39] *Weingrad*, 2010 WL 711801 at *3.
[40] *Id*. at *4.

Probate, and Trust Law Section of The Florida Bar, the bill may have a positive fiscal impact on local governments because there may be a taxable event upon certain inter vivos transfers of homestead real property.[41]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 26, 2010:
The committee substitute:

- Provides requirements for how notice is to be given to an insurance company, financial institution, or other obligor alerting them of a claim that a marriage was procured by fraud, duress, or undue influence;
- Allows a court to modify the distribution under a will where the will erroneously includes federal estate tax-related formulas;
- 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; and
- Amends the effective date to provide that except as otherwise provided in the bill and except for the effective date section of the bill, which takes effect upon becoming a law, the bill shall take effect October 1, 2010.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

[41] White Paper for s. 732.4017, F.S., *supra* note 19.