**PROBATE LAW AND PROCEDURE COMMITTEE**
**AGENDA**
**Friday, January 11, 2008**
**2:00 p.m. – 4:00 p.m.**
**Casa Marina Resort and Beach Club**
**Key West, Florida**

Minutes of the Meeting of the
Probate Law and Procedure Committee
The Tampa Airport Marriott Hotel
Tampa, Florida
September 26, 2007
12:00 p.m. to 1:30 pm

**I.** **Call to Order**: The meeting was called to order at 12:00 p.m. by Charlie Nash, Chair. Sandy Diamond graciously volunteered to serve as Secretary of the meeting. The Chair thanked our sponsors, BNY Mellon Financial and Wealth Transfer Planning Document Assembly Program.

**II.** **Attendance**: It was determined that a quorum was present. The Attendance roster was circulated to be initialed by the committee members present in person. Attendance of those that attended by telephone was taken. Based upon the roster, those in attendance included the following:

| **Name** | **In Attendance** |
|---|---|
| Angela M. Adams | |
| Louie N. Adcock, Jr. | IP |
| David J. Akins | |
| Joyce U. Ballack | PH |
| Phillip A. Baumann | IP |
| Jeff Baskies | |
| William F. Belcher | |
| William R. Blackard | PH |
| Debra L. Boje | |
| Judy B. Bonevac | |
| Sam W. Boone, Jr. | IP |
| Tae Bronner | IP |
| Dresden Brunner | |
| William M. Burke | |
| Anne K. Buzby | PH |
| Manley Caldwell | |
| Chad W. Callahan, III | |
| Dan Capes | |
| David R. Carlisle | |
| J. Richard Caskey | IP |
| Neil R. Chrystal | |
| John P. Cole | |

| | |
|---|---|
| Stacey L. Cole | |
| Tami Conetta | |
| Jean Crain | |
| Sandra Diamond | IP |
| Edward Downey | |
| Michael Dribin | PH |
| Peter Dunbar | |
| Martha Edenfield | |
| Guy Emerich | |
| James J. Feeney | |
| Brian J. Felcoski | |
| Norman Fleisher | |
| John Peter Friedrich | |
| Richard Gans | IP |
| David M. Garten | |
| George M. Germann | |
| Jeffrey S. Goethe | IP |
| Robert W. Goldman | |
| Deborah Goodall | |
| Linda Griffin | IP |
| Hon. M. Grossman | PH |
| Russell Hale | PH |
| M. Travis Hayes | |
| Steven L. Hearn | |
| Kelly Henderson | |
| William T. Hennessey | |
| Jami L. Huber | |
| Roger Isphording | |
| John Arthur Jones | |
| Thomas M. Karr | |
| Rohan Kelley | PH |
| Sean Kelley | |
| Shane Kelley | PH |
| Andrea Kessler | |
| Edward F. Koren | |
| Hon. Maria Korvick | |
| Scott Krasny | |

| | |
|---|---|
| Keith Kromash | IP |
| Rose M. LaFemina | PH |
| Barbara Landau | |
| Laird Andrew Lile | |
| Kristen Lynch | |
| Marsha Madorsky | |
| Michael A. Malakoff | |
| Stewart Marshall, III | IP |
| Glenn M. Mednick | PH |
| Mark T. Middlebrook | |
| Richard C. Milstein | |
| John C. Moran | |
| Rex E. Moule | IP |
| Charles Ian Nash | IP |
| William M. Pearson | |
| Donald R. Peyton | PH |
| Frank T. Pilotte | IP |
| William R. Platt | |
| Marilyn Polson | IP |
| Pamela O. Price | IP |
| James I. Ridley | |
| Alexandra Rieman | PH |
| Ronald H. Roby | |
| Deborah Russell | IP |
| Don Scarlett | |
| Hon. Larry Seidlin | |
| Andrew J. Severson | |
| John M. Severson | |
| Hon. Susan Sexton | |
| William E. Sherman | PH |
| Michelle N Shupe-Abbas | |
| David Silberstein | |
| Richard D. Sneed, Jr. | |
| Hon. Mark Speiser | |
| Lynn Suzanne Spradley | |
| Michael P. Stafford | |

| | |
|---|---|
| Laura Stephenson | |
| Laura K. Sundberg | |
| John A. Tallarido | |
| Donald R. Tesecher | |
| Hon. Patricia Thomas | |
| Thomas H. Thurlow, III | |
| Thomas K. Topor | PH |
| Robert "Bo" Trudeau | |
| Eric Virgil | |
| Jerry B. Wells | |
| Hon. John D. Wessel | |
| Dennis R. White | PH |
| Richard White | |
| Charles Wohlust | |
| Marjorie E. Wolasky | |
| Jerome Lee Wolf | |

**III.** **Minutes: Reading and Approval of the Minutes of the Previous Meeting:** Upon motion duly made, seconded and unanimously carried, the Minutes of the August 2, 2007 meeting (Pages 2-8 of the Agenda Packet) of the Committee were unanimously approved with out correction

**IV.** **REVISION TO F.S. 733.602(1):** The Chair reported on a proposed amendment to F.S. 733.602(1), to remove an unnecessary and incorrect cross-reference to the Florida Trust Code. **Upon motion duly made and seconded, the proposed change to F.S. 733.602(1) was approved unanimously.**

**V.** **REVISION TO F.S. 732.402, EXEMPT PROPERTY:** The Chair discussed that revisions to this statute had been previously discussed after a proposal circulated by him. He received several suggestions. It was determined to look at each section of the statute individually.

1. 732.402(c): Revision to Section (c) of the statute was proposed to conform this statute to the changes which were previously made to F.S. 222.22 to include all 529 Plans regardless of the state in which they had been established. It was pointed out that there was a typographical error in the proposal in the word "program". **Upon motion duly made and seconded, the committee voted unanimously to adopt the change to F.S. 732.402(c) as follows:**

All qualified tuition programs authorized by s 529 of the Internal Revenue Code of 1986, as amended, including, but not limited to, the Florida Pre-Paid College Trust Fund Advance Payments Contracts under s.1009.98 and Florida Pre-Paid College Trust Fund Participation Agreements under s.1009.981.

2. F.S. 732.402(b):

a. The committee discussed whether the term "automobiles" in the current statute should be modified to be more inclusive of other types of motorized vehicles that were licensed. Stewart Marshall questioned whether we wanted to exempt extremely expensive vehicles including motor homes. Pam Price pointed out that we might not be able to craft a statute that eliminated all abuses but that we should be able to come up with a definition appropriate in 80% of decedent's estates. There was considerable discussion as to the method used to define "vehicles" that would be exempt. It was Charlie Nash's suggestion that an appropriate method would be to use the weight of the vehicle. **Upon motion duly made and seconded, the exemption shall apply to a vehicle no greater than 10,000 pounds to 12,000 pounds, (the higher limit to be used if it is necessary to include six-wheeled farm vehicles. ) Such gross vehicle weight to be determined as listed on the vehicle's title.**

b. There was a vigorous discussion of the number of vehicles which should be exempt. Some committee members felt that the current statute which exempted all vehicles in the decedent's name and regularly used by the decedent or members of the decedent's family was appropriate. Others felt strongly that a limitation on the number of exempt vehicles was necessary in order to avoid abuse. Pam Price suggested limiting the exemption to one (1) vehicle per licensed driver in the family. Several Committee members suggested two vehicles per decedent. **Upon motion duly made and seconded, it was determined that the exemption should be limited to two (2) vehicles in the decedent's name and regularly used by the decedent or members of the decedent's family as their personal vehicle.**

c. There was a discussion whether there should be a limitation on the value of the vehicles which would be exempt. Stewart Marshall moved that the exemption be limited to net value of $20,000.00 per vehicle. The motion, which was seconded by Tae Bronner, failed to be adopted. **Tae then moved that there should be no value**

**limit for the two (2) vehicles exempted. Motion was seconded by Sam Boone. This motion was adopted.**

d. There was a discussion regarding the meaning of the term "personal" as it related to the vehicles in the statute. Charlie felt that the term should be eliminated from the statute. This suggestion died from the lack of a formal motion.

3. F.S. 732.40(a): There was a discussion of whether or not "household furniture, furnishings, and appliances" should be expanded in order to encompass electronic equipment such as computers and big-screen televisions. Louie Adcock argued that tinkering with the phrase "furniture and furnishings" could pose the risk of excluding a particular item. He felt that the term "furnishings or appliances" was sufficiently broad to include most types of electronic equipment.

There was a general discussion that the exemption of $10,000.00 was out of date and had not been changed since initial versions of the statute**. Upon motion duly made and seconded and adopted, it was determined to increase the $10,000.00 net value exemption to a net value of $20,000.00 as of date of death.** It was also pointed out that these items of exempt property are exempt from claims.

Charlie indicated that based on the decisions of the committee he would prepare a new draft of the statute to be considered at the Executive Counsel Meeting in Ireland.

**VI. ADJOURNMENT:** The meeting was adjourned at 1:30 pm. The next meeting of the committee will be held at the Casa Marina Resort in Key West on January 10, 2008.

Topics and Agenda

RPPTL CLE Program

**"Estate Administration Issues Resulting from Good Planning,**

**Bad Planning or No Planning"**

September 26 and 27

**8:00 to 8:25** Registration

**8:25 to 8:30** **Welcome and Opening Remarks** by Deborah Russell, Board Certified in Wills, Trusts & Estates, *Cummings & Lockwood LLC,* Naples, Program Chair

**8:30 to 9:20** **"Homestead - Diamond in the Rough or Coal in Your Stocking"** by Charlie Nash, Board Certified in Wills, Trusts & Estates, *Nash, Moule & Kromash, LLP*, Melbourne.

A comprehensive discussion of everything you need to know about how to deal with the homestead property of a decedent.

**9:20 to 10:10** **"After the Discount - Administering the FLP Interest in the Partner's Estate"** by Jerry Wolf, Board Certified in Wills, Trusts & Estates, *Duane Morris LLP*, Boca Raton.

Partnership/LLC Interests Owned by an Estate: Now that the interest is in the estate, what do you do with it? The efforts that went into a complex estate plan will be wasted if these assets are not properly administered during an estate administration.

**10:10 to 10:20** **Break**

**10:20 to 11:10** "**Potpourri of Death Settlement Tax and Income Allocation Issues … Not from A to Z, but from C to J to K to S"** by Lester Law, Senior Vice President, *US Trust, Bank of America Private Wealth Management*, Naples.

A discussion of the income tax issues associated with closely held entities during estate administration, including (a) administering QSSTs from the election through the administration; (b) issues to consider before making a Section 754 election; (c) phantom income; and (d) allocations between trust income and principal under Florida's P&I Act. This will also cover grantor trust status post death, 5 & 5 powers, and issues to consider before making the section 645 election.

**11:10 to 12:00** **"Valuation Issues - You Think That Property Interest is Worth How Much?"** by Tim Bronza, Accredited Senior Appraiser in Business Valuation with the American Society of Appraisers, Winter Park, and Steven Brooks, Senior Fiduciary Officer, *Mellon Private Trust Company*, Miami.

A practical guide to valuation issues, with a summary of case law to look at the factors courts are considering when deciding whether to accept the value of the appraiser.

**12:00 to 1:30 Lunch**

**1:30 to 2:20 "Thank Heaven for Little Girls and Disclaimers"** by Richard Gans, Board Certified in Wills, Trusts and Estates, *Fergeson, Skipper, Shaw, Keyser, Baron & Tirabassi, P.A.*, Sarasota.

An overview of Florida's Disclaimer Statute and the use of disclaimers to avoid unintended results or to achieve tax benefits not anticipated by the original plan.

**2:20 to 3:10 "IRAs Can Be Hazardous to an Estate Administration"** by Rex Moule, Board Certified in Wills, Trusts and Estates, *Nash, Moule & Kromash, LLP*, Melbourne.

A discussion of the rules governing the distribution of IRA assets after the Account Owner's death and possible solutions when the beneficiary designation form trumps the estate plan.

**3:10 to 4:00 "The Way to Dusty Death - Florida Law Regarding the Disposition of Human Remains"** by Keith Kromash, *Nash, Moule & Kromash, LLP*, Melbourne.

A review of current Florida law governing disputes over the decedent's remains when there is no direction in the Will as to what to do with the body and when there is direction in the Will, but a surviving relative disagrees with that direction.

**Proposed Changes to the Elective Share**

**732.2025. Definitions**

As used in ss. 732.2025-732.2155, the term:

(10) "Transfer in satisfaction of the elective share" means an irrevocable transfer by the decedent during life to an elective share trust.

> **Comment**: This change clarifies (as was the original intent) that a transfer in satisfaction of the elective share is an inter vivos transfer.

**732.2045. Exclusions and overlapping application**

(1) Exclusions.--Section 732.2035 does not apply to:

(f) The decedent's one-half of the property to which ss. 732.216-732.228, or similar statutes in another state, apply and real property that is community property under the laws of the jurisdiction where it is located.

> **Comment**: This change extends the exclusion for property described in Florida's version of the Uniform Disposition of Community Property Rights At Death Act (ss. 732.216-732.228) to property covered by similar provisions in other states. The exclusion accounts for the fact that the surviving spouse already takes half of that property, so it is inappropriate to give the spouse an elective share of that property too. The issue is the same whether the property is subject to Florida's version of the statute or that of another state.

**732.2075. Sources from which elective share payable; abatement**

(1) Unless otherwise provided in the decedent's will or, in the absence of a provision in the decedent's will, in a trust referred to in the decedent's will, the following are applied first to satisfy the elective share:

(a) To the extent paid to or for the benefit of the surviving spouse, the proceeds of any term or other policy of insurance on the decedent's life if, at the time of decedent's death, the policy was owned by any person other than the surviving spouse.

(b) To the extent paid to or for the benefit of the surviving spouse, amounts payable under any plan or arrangement described in s. 732.2035(7).

(c) To the extent paid to or for the benefit of the surviving spouse, the decedent's one-half of any property described in s. 732.2045(1)(f).

(d) Property held for the benefit of the surviving spouse in a qualifying special needs trust.

(e) Property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse, including interests that are contingent upon making the election, but only to the extent that such contingent interests do not diminish other property interests that would be applied to satisfy the elective share in the absence of the contingent interests.

(f) Property interests that would have satisfied the elective share under any preceding paragraph of this subsection but were disclaimed.

This section applies to property which passes or has passed in trust for the surviving spouse only if the trust meets the requirements of an elective share trust or a qualifying special needs trust.

**Comment**: This change restricts those trusts that count in satisfaction of the spouse's elective share right to qualifying elective share and special needs trusts. Without the change, other trusts can satisfy the elective share right but only at their transfer tax value not to exceed 50 percent of the principal of the trust. The question of when a trust has a transfer tax value and what that value is is one of the biggest uncertainties and arguing points in the statute. Moreover, crediting the transfer tax value of a nonqualifying trust against the elective share right creates a loophole in the statute when all of the estate is left to a trust the transfer tax value of which does not equal the elective share right of the spouse. In that event, there will be no other property available to satisfy the "unsatisfied balance" referred to in s. 732.2075(2). The change closes the loophole and eliminates a major uncertainty and litigation point. Note that this change must be considered (and adopted) only in conjunction with the changes made to ss. 732.2095 and 732.2105(below).

**732.2095. Valuation of property used to satisfy elective share**

(2) Except as provided in this subsection, the value of property for purposes of s. 732.2075 is the fair market value of the property on the applicable valuation date.

(d) In the case of any policy of insurance on the decedent's life the proceeds of which are payable outright or to a trust described in paragraph (b) or paragraph (c), the value of the policy for purposes of s. 732.2075 and paragraphs (b) and (c) is the net proceeds.

(e) In the case of a right to one or more payments from an annuity or under a similar contractual arrangement or under any plan or arrangement described in s. 732.2035(7), the value of the right to payments for purposes of s. 732.2075 and paragraphs (b) and (c) is the transfer tax value of the right on the applicable valuation date.

**Comment**: With the change to s. 732.2075(1) (above), paragraph (d) of s. 732.2095 is no longer needed.

**732.2105. Effect of election on other interests**

(1) The elective share shall be in addition to homestead, exempt property, and allowances as provided in part IV.

(2) Except as provided in subsection (3), if an election is filed , the balance of the elective estate, after the application of s. 732.2145(1), shall be administered as though the surviving spouse had predeceased the decedent.

(3) Subsection (2) does not apply unless the surviving spouse's elective share exceeds the value of the interests applied in satisfaction of the elective share under s. 732.2075(1).

**Comment**: As originally enacted, s. 732.2105 included a provision similar to the added subsection (2) above. That provision was subsequently removed from the statute because it was deemed unnecessary since any interest of a spouse in the decedent's estate is applied in satisfaction of the elective share right. In addition, the belief was that spouse's who make an election only to find that their rights under the decedent's estate plan exceed in value the amount of the elective share should not be penalized by the forfeiture of the excess. However, elimination of the provision had an unintended consequence. It eliminated all downside to making the election in any estate with the result that well advised spouses will always make a prophylactic election. This can result in inconvenience, delay and expense to the estate as it copes with an election that will never actually be pursued.

With the changes noted above, not all interests of the spouse will be applied in satisfaction of the spouse's elective share right. Subsection (2) is therefore necessary to prevent the spouse from double dipping by claiming an elective share and by continuing as a beneficiary of a trust that is not applied in satisfaction of the elective share right. To address the penalty concern that the former scheme was intended to address, subsection (2) is limited in subsection (3) to those cases where the spouse's interest in the estate that do apply in satisfaction of the elective share do not equal or exceed the amount of that right. As a consequence of the limitation, for example, if the spouse interest in an elective share trust exceeds the amount of the elective share right, subsection (2) will not apply and the spouse will retain his or her entire interest in that trust. In cases where subsection (2) will apply, the fact that the spouse will forfeit something if the election is made should curtail the kind of prophylactic election describe above.

# Report of the
# Ad Hoc Committee on Non-Probate Property
# Angela Adams

# Report of the Subcommittee on Unclaimed Property

Phillip Baumann

1/7/2007

Charlie:

I will be unable to attend this meeting. I want to report that I have had no responses from the Bureau of Unclaimed Funds relative to our work on that issue. Apparently, the people there now do not see a need for any changes and are happy with the status quo. It is my recommendation that we drop the idea, since we were doing the work at the request of the people who used to work for the Bureau and who believed there was a problem.

Phil Baumann

# Report of the Subcommittee on Caveats
# John Severson

MEMORANDUM

A subcommittee was formed to review Florida Statutes 731.110 and Rule 5.260, as relates to filing of a Caveat by Interested Person for a not-yet-deceased person's Estate. The subcommittee consisted of John Moran, Shane Kelley and John Severson. A subcommittee meeting was held May 1, 2007 to discuss the issues raised.

Neither the Rule nor the Statute appear to specifically prohibit a pre-death filing of a caveat. John Moran reviewed the Legislative history surrounding the Statute and found no discussion relating to the same. The Statute and Rule both reference the content of a caveat in relation to the "decedent" and his or her "estate." Notwithstanding the nomenclature, the subcommittee determined that a pre-death caveat could be filed.

The issue originally arose relative to the practical problems faced by the Clerk when a caveat is filed that could conceivably linger for years prior to the death of the individual in relation to whom the caveat was filed. Also, there was concern that the probate forms did not accommodate this contemplated filing.

The subcommittee voted to ask the full Probate Law Committee two questions:

1. Does the Committee as a whole agree that pre-death caveats should be allowed?
2. If so, are the Statute and the Rule so confusing as to require changes to them?

The subcommittee was of the opinion that pre-death caveats should be permitted and that no changes need be made to the statute or rule.

## Proposed Changes to Florida Statutes and the Florida Probate Rules:

**Rule 5.260. CAVEAT; PROCEEDINGS**

**(a) Filing**. Any creditor or interested person other than a creditor may file a caveat with the court, either before or after the death of the person for whom the estate is being, or will be, administered.

**(b) Contents.** The caveat shall contain the ~~decedent's~~ name, the ~~decedent's~~ social security number or date of birth of the person for whom the estate is being, or will be, administered, if known, a statement of the interest of the caveator in the estate, and the name, specific mailing address, and residence address of the caveator.

**(c) Resident Agent of Caveator; Service.** If the caveator is not a resident of Florida, the caveator shall file a designation of the name and specific mailing address and residence address of a resident in the county where the caveat is filed as the caveator's agent for service of notice. The written acceptance by the person appointed as resident agent shall be filed with the designation or included in the caveat. The designation and acceptance shall constitute the consent of the caveator that service of notice upon the designated resident agent shall bind the caveator. If the caveator is represented by an attorney admitted to practice in Florida who signs the caveat, it shall not be necessary to designate a resident agent under this rule.

**(d) Filing After Commencement**. If at the time of the filing of any caveat the decedent's will has been admitted to probate or letters of administration have been issued, the clerk shall forthwith notify the caveator in writing of the date of issuance of letters and the names and addresses of the personal representative and the personal representative's attorney.

**(e) Creditor.** When letters of administration issue after the filing of a caveat by a creditor, the clerk shall forthwith notify the caveator, in writing, advising the caveator of the date of issuance of letters and the names and addresses of the personal representative's attorney, unless notice has previously been served on the caveator. A copy of any notice given by the clerk, together with a certificate of the mailing of the original notice, shall be filed in the estate proceedings.

**(f) Other Interested Persons; Before Commencement**. After the filing of a caveat by an interested person other than a creditor, the court shall not admit a will of the decedent to probate or appoint a personal representative without service of formal notice on the caveator or the caveator's designated agent.

**Florida Statute 731.110. CAVEAT; PROCEEDINGS**

(1) Any person, including a creditor, who 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 may file a caveat with the court, either before or after the death of the person for whom the estate is being, or will be, administered.

(2) A caveat shall contain the ~~decedent's~~ social security number, last known residence address, and date of birth of the person for whom the estate is being, or will be, administered, if they are known, as identification, a statement of the interest of the caveator in the estate, the name and specific residence address of the caveator, and, if the caveator, other than a state agency, is a nonresident of the county, the additional name and specific residence address of some person residing in the county, or office address of a member of The Florida Bar residing in Florida, designated as the agent of the caveator, upon whom service may be made.

(3) A caveat filed before death shall expire five (5) years after filing.

# Report of the Subcommittee on Homestead
# Jeff Baskies

## HOMESTEAD LAW SUBCOMMITEE MEMORANDUM/REPORT

I. Introduction:

Currently, Florida's Homestead laws restricting devise are failing to accomplish many of the goals they purport to achieve; as a result, change is required. Instead of helping and protecting surviving spouses and minor children, the Homestead devise restrictions often harm them. Our Homestead Law Subcommittee of the Probate Law and Procedure Committee has certain suggestions contained herein which we urge the Committee to consider.

While we can all imagine cases where the current homestead devise restrictions do not cause harm, that fact alone does not mean the Homestead laws work well. Indeed, the Homestead restrictions on devise could be tweaked to continue to help those often aided by them already, while protecting those on the margin who are being harmed and are most in need of change. As will be noted below, there are so many instances where the constitutional and statutory restrictions on Homestead devise fail to accomplish rational public policies, the time has come to offer some reforms.

From the recent Third District Court of Appeals decision in Cutler v. Cutler (32 FL Law Weekly D 583):

> It has been said by those who labor in the area, that "the leading cause of cerebral herniation among probate lawyers, real estate lawyers, circuit court judges sitting in probate, and appellate judges reviewing their work, is the study of the ['']legal chameleon['], also known as homestead." (cites omitted)

Why should this vitally important area of the law be so difficult? Why should the disposition of such a valuable asset - for many clients the homestead may be the most valuable asset they own - be so difficult to explain and even more importantly so difficult to understand?

If the Homestead restrictions on devise were only difficult, then that should not justify reform. Hard work and toil in understanding the law was a promise made to all of us in the 1st year of law school. No, reform is not needed just because the understanding of homestead is difficult; instead, reform is needed because the Homestead restrictions on devise are no longer fulfilling their intended purposes for many residents of the state.

II. Background on Homestead

There are a variety of statutes that impact Homestead (tax statutes, exemption statutes and probate statutes), but the fundamental law of Homestead comes from the Florida Constitution, the key provisions of which are:

> SECTION 4. Homestead; exemptions.--

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of
>
> taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;
>
> (2) personal property to the value of one thousand dollars.
>
> (b) These exemptions shall inure to the surviving spouse or heirs of the owner.
>
> (c) 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. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

As noted, there are many types of homestead under Florida law and the first and perhaps most important step in any homestead discussion is to distinguish the categories of homestead being addressed. As the Florida Supreme Court stated in the seminal case of Snyder v. Davis, 699 So. 2d 999 (Fla 1997), there are essentially three kinds of homestead we must distinguish.

*A. Homestead Creditor Protection*

The basic rules for protecting homesteads from the claims of creditors are provided in Article X, Section 4 of the Florida Constitution, and Chapter 222, FS. Section 4(a)-(b) of Article X of the Constitution generally protect homesteads from forced sale by creditors. There are certain restrictions (e.g. size of the property inside and outside a municipality) and there are certain exceptions (e.g. for property taxes of for those who provide services improving or repairing the homestead).

These provisions are not at issue for the purposes of this Memorandum, although the absolute protections they afford are coming under attack – by Medicaid laws and bankruptcy laws, for example.

*B. Homestead Real Property Tax Exemption and related Save Our Homes Cap*

The basic rules for the Homestead Property Tax Exemption and the related Save Our Homes cap on property tax assessments are found in Section 6 of Article VII of the Florida Constitution and Chapter 196, Florida Statutes ("FS").

Again, these provisions are not at issue for the purposes of this Memorandum, although it appears obvious that these provisions of law are also not working well. The Florida legislature has been meeting in special sessions for almost a year exploring options. While the issues are complex and worthy of further consideration, they are not within the scope of the purposes of this Memorandum.

*C. Homestead Property Restrictions on Devise*

At the heart of this Memorandum are the issues created by the Homestead restrictions on devise provided in Article X, Section 4 of the Florida Constitution and Section 732.401 and 732.4015, F.S. As noted above, Article X, Section 4(c) provides that:

> (c) 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. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

This section delineates the key issues faced in trying to alienate an interest in Homestead property during life and upon death. Obviously, the protections are designed to "protect" surviving spouses and minor children. As will be explored below, there are many instances now, where these restrictions hinder typical and efficacious planning for the beneficiaries.

Also it is vital to note that the above-quoted section of the Constitution only restricts devise, it does not say what happens to an improperly devised Homestead. The consequences of improperly devising a homestead are instead interpreted by statute – F.S. 732.401.

III. <u>Some of the Problems:</u>

*A. The New Homestead Trap for Surviving Spouses:*

As highlighted in an article published in the June 2007 edition of the Florida Bar Journal, the homestead protections for surviving spouses are trapping many unhappy widows in homes they no longer want and can no longer afford. The problems for many surviving spouses can be summarized as follows.

Under the principal and income act, the life estate created to protect surviving spouses causes them to have to pay for the income portion of any mortgage, all of the ad valorem real property taxes, all of the property insurance and virtually all of the repairs,

even including special assessments or major repairs caused by hurricanes. While there are some exceptions for major improvements expected to be useful for longer than the spouse's life expectancy, even those are proportionately charged against the spouse.

Moreover, if a spouse wants to move to a new home or to an assisted living facility or nursing home, the law gives no relief to the spouse against all of these charges. The only remedy is to rent the property and hope that the rent meets or exceeds the expenses. However, for many, particularly after losing the Save Our Homes cap, the costs exceed the rental value. Florida law does not currently provide a means to sever the tenancies and does not permit a partition.

Further exacerbating the problems has been a following dynamic: as the expenses for life tenants have soared (indeed they have borne 100% of the two worst fiscal crises faced in the state – sky-rocketing property taxes and property insurance costs), the Florida real estate market has caused dramatic increases in the values of many homesteads. The increased values inure to the remainder beneficiaries exclusively. How does that help or protect a surviving spouse?

### *B. Credit Shelter Planning*

For many clients, the homestead is a valuable component of their gross estate. And for many clients, the increasing federal estate tax exemption has created a premium on using the homestead to fund the exemption of one or both of the spouses. The restrictions on devise make it virtually impossible for Florida residents to avail themselves of the very common estate planning technique of funding a Credit Shelter Trust with an interest in the homestead. This is a very common planning technique that is used in many other states to help protect the estate tax exemptions of both spouses and maximize the tax-free inheritance for the children. Yet, this simple and beneficial planning may not be possible under Florida law.

To some extent, clients can use half the homestead to fund a Credit Shelter Trust by titling the property as tenants-by-the-entirety and then having the surviving spouse disclaim one-half of the property. The disclaimer statute clearly supports such as not creating a homestead interest subject to the restrictions on devise.

F.S. 739.203(4) provides: "A disclaimer of an interest in real property held as tenants by the entirety does not cause the disclaimed interest to be homestead property for purposes of descent and distribution under ss. 732.401 and 732.4015."

But what if the clients need or want to use more than half of the homestead to fund a trust on the first death? Or what if there is a reluctance to rely on a disclaimer – such as in a second or third marriage situation with children from a prior marriage? After all, that plan is dependent on a future decision by the surviving spouse after the first spouse's death. That level of uncertainty makes this planning unfavorable to many clients

### *C. Planning for an Incapacitated Spouse – Medicaid Planning*

The devise restrictions also pose significant problems in Medicaid planning for married clients. In Medicaid planning, planners often transfer the homestead to the community spouse (the "well" spouse at home) to avoid having title vest in the institutionalized spouse for a few reasons, in case the community spouse dies first.

Homestead is an exempt asset and generally won't affect Medicaid eligibility (unless the equity exceeds $500,000), whether the institutionalized spouse owns the whole thing or just a life estate after the other spouses death, but there are a few ramifications.

First, if the homestead equity exceeds $500,000 over the next few years the law will cause the loss of Medicaid eligibility. Second, the Medicaid recovery rules will force/allow recovery on the institutional spouse's death. Third, one of the biggest issues after the first death for the single institutionalized surviving spouse is how to deal with the homestead. As owner of fee or life estate, it is that person's problem and the income of the institutionalized person can only be used for personal needs allowance ($35 per month) which the institutionalized person gets to keep or the patient responsibility which must be paid to skilled nursing facility.

Taken together, these problems mean the inability of the first spouse to leave the home in a Special Needs Trust for the survivor could significantly complicate traditional Medicaid planning, and this problem will be getting worse in the next few years.

*D. Special Needs Trust planning for a Disabled Minor Child*

Another difficult issue of homestead planning is protecting a disabled minor child. For example, assume a client has a disabled minor child. The traditional estate plan would provide funds for the child in a Special Needs Trust designed to supplement the public support the child receives but not to supplant such. In many cases the public support, particularly qualification for the health insurance coverage, is vital to the care and well-being of the minor.

But the Homestead devise restrictions abrogate the ability to plan for the disabled minor child. Instead, by law, the homestead will pass to the children in equal shares or all to the disabled child if that's the only child. Ownership of the homestead could well cause a loss of public benefits for that child for an extended period. Moreover, it also means a client may not be able to fund a Supplemental Needs Trust to help alleviate some of the extraordinary difficulties faced by the disabled child.

Again, we see how the Homestead devise restrictions which are designed to protect spouses and minor children might actually backfire.

*E. Trust Planning for Minor Children*

The overwhelming majority of all clients who plan for the passage of wealth to their minor children do not leave the funds outright – and thus in a guardianship. While necessary, guardianship is a costly and often wasteful process which makes a judge the arbiter of how to use the funds for the client's children. Further, guardianships terminate at age 18 and vest in the children outright. Again, the overwhelming majority of all clients who bother creating estate plans opt out of guardianship and into a trust plan that will last beyond the child's 18th birthday.

Clients may be shocked to find out that the beautiful estate planning documents they created will be completely ineffective to control the disposition of their homestead. Imagine the client's upset if the home is worth many millions of dollars.

Obviously, the Florida Statutes do not have to match the majority of estate plans – otherwise the entire intestacy statute might need to be updated. But for those clients who

actually bother to do estate planning, shouldn't we encourage a system of law that allows the planning to be operative?

## IV. Proposals for Reform of Homestead Devise Restrictions and to Protect Life Tenants

### *A. Total Repeal*

One reform offered for consideration is the easiest to understand. That is: consider a total repeal of the Constitutional and statutory restrictions on Homestead devise. The effect of doing so would be to permit clients to leave homes to anyone or any entity they choose.

On the one hand, total repeal is clean, neat and easy to understand. The arguments for total repeal are easily made and easily supported. If the homestead devise restrictions are repealed, then all of our clients can plan their estates more effectively. First, they can fund Credit Shelter Trusts easily. Second, they can plan for incapacitated beneficiaries – spouses, minors or others. Finally, clients can beneficially plan for their children. There are a lot of benefits to total repeal.

On the other hand, total repeal means a spouse might leave the home to someone other than the surviving spouse forcing the survivor to have to move. That's a situation where the restrictions on devise might have benefited the survivor. On the other hand, this result could be remedied by adopting a modification to the elective share statute.

Reading the sentiment of the subcommittee, there appear to be about an even mix of those favoring total repeal and those against. It is acknowledged that among those active in the Bar, there seems to be strong sentiment toward retaining the Constitutional restrictions on devise. Further, the subcommittee recognizes that similar efforts toward total repeal of the Homestead restrictions on devise have been brought forward in the past and have failed. It is hard to pinpoint changes which have occurred since then warranting hope for success now. Besides bringing any Constitutional change to the Homestead laws before the voting public runs the risk of being confused with all the other homestead matters – including the beloved Save Our Homes provisions. Such confusion could make passage virtually impossible.

Thus, this subcommittee suggests the Committee (and ultimately perhaps the executive council of the RPPTL) should consider if the topic of total repeal is again ripe for consideration and discussion. However, in the interim, the subcommittee also suggests consideration for some alternative plans and statutory changes outlined below.

### *B. Recommended Statutory Reforms*

#### 1. Right to Partition: Life Estates and Remainders – Reform Chapter 64

One potential statutory reform supported by the subcommittee is adoption of a modification to chapter 64, F.S. to permit a life tenant (although there was a discussion of permitting a remainder beneficiary) to seek partition as a matter of right.

Although, the committee suggests only allowing a life tenant to force partition, if this proposal is expanded to include a right for a remainder beneficiary to seek partition, the committee strongly urges such to not be a matter of right but only be applicable within

the equitable decision-making of the court. Further, if partition by remainder beneficiaries is considered, then F.S. 64.051(2) should be modified to add something like:

> If the action is brought by an owner of an interest in protected homestead other than the surviving spouse, the court may order partition to be made after taking into consideration the needs, welfare and best interests of the surviving spouse, and balancing those interests against any special interests of any minor or dependent descendants of the decedent who own a vested remainder interest in the protected homestead.

Chapter 64 of the Florida Statutes governs partition actions. With only a few modifications, it can be amended to allow partition of protected homestead property between surviving spouses and the decedent's lineal descendants.

The subcommittee proposes revising chapter 64 as follows:

> Section 64.031 is amended to read as follows.
>
> 64.031 Parties.--The action may be filed by any one or more of several joint tenants, tenants in common, owners of life estate created by F.S. 732.401, or coparceners, against their cotenants, coparceners, or the holders of remainder interests (in the case of life estates created by F.S. 732.401), or others interested in the lands to be divided.
>
> Section 64.041 is amended to read as follows.
>
> 64.041 Complaint.--The complaint shall allege a description of the lands of which partition is demanded, the names and places of residence of the owners, joint tenants, tenants in common, owner of life estate created by F.S. 732.401 or the holders of remainder interests (in the case of life estates created by F.S. 732.401), coparceners, or other persons interested in the lands according to the best knowledge and belief of plaintiff, the quantity held by each, and such other matters, if any, as are necessary to enable the court to adjudicate the rights and interests of the party. If the names, residence or quantity of interest of any owner or claimant is unknown to plaintiff, this shall be stated. If the name is unknown, the action may proceed as though such unknown persons were named in the complaint.
>
> Section 64.051 is amended to read as follows.
>
> 64.051 Judgment.--
>
> (1) The court shall adjudge the rights and interests of the parties, and that partition be made if it appears that the parties are entitled to it. When the rights and interests of plaintiffs are established or are undisputed, the court may order partition to be made, and the interest of plaintiffs and such of the defendants as have established their interest to be allotted to them, leaving for future adjustment in the same action the interest of any other defendants.
>
> (2) In the case of an action for partition of protected homestead as defined in s. 731.201(32) where the surviving spouse owns a life estate, the surviving spouse shall be entitled to an order of partition if the action is brought by the surviving spouse.
>
> (3) If any party to the action alleges that tax as defined in s. 733.817(1)(n) will be due by reason of a severance as ordered by the court, the court

shall determine all issues concerning apportionment of that tax under applicable federal and state law. The court shall have jurisdiction to determine the probable tax due or to become due from all interested persons, apportion the probable tax, and enter orders and judgments to enforce payment of any tax as so apportioned. The court may retain jurisdiction over the parties and issues to modify the order of apportionment as appropriate until after the tax is finally determined.

This proposal only gives the spouse a right to a partition. The subcommittee debated giving remainder beneficiaries a right to seek partition, but overall the subcommittee seemed to favor only permitting surviving spouses to seek partition, while not permitting remainder beneficiaries to displace the life tenants – not affording the ability to "throw the life tenant out" at will.

This proposal will go a long way to helping and protecting those surviving spouses who currently have life estates (or may receive them in the future) they don't desire to retain, while weighing and balancing the interest of the remainder beneficiaries.

**COMMITTEE MEMBERS PLEASE CONSIDER**: A few issues were left for further consideration.

The first issue is whether we should prose adopting a new Section (4) to direct the disposition of the funds in case of a partition. For example, the subcommittee felt we might want to suggest defining the disposition to be an actuarial split of the proceeds based on Section 7520 of the Code, but taking into consideration a terminal condition (as defined by the Code). The subcommittee notes that if we do so, we have to deal with Section 2519 of the Code and gift tax concerns. The intent was to create a process to apportion and collect tax similar to section 733.817 – see subsection (3) proposed above. Alternatively, the subcommittee considered adopting a statute requiring the proceeds from the sale to be held in a "QTIP-type" trust for the balance of the survivor's life – leaving open the issue of who should be trustee. Another alternative might be to leave the disposition of the funds to the court's discretion.

The second issue is whether we should allow the remainder beneficiaries a statutory right to buy out the life beneficiary if a partition is triggered. While the general rules of Chapter 64 would permit a bid at an auction, perhaps the subcommitee could draft a new Section which would give a "right of first refusal" to the remainder beneficiaries so they could buy out the surviving spouse if preserving the family homestead is a value to them. We could perhaps adopt an appraisal process overseen by the court to allow a buy-out before a public sale.

2. Reform Section 732.401

Our subcommittee members recognized that the Florida Constitution says Homestead may not be devised under certain circumstances, but it's the Florida Statutes that say what constitutes a "devise" and/or what happens in case a devise is constitutionally barred. That led us to Section 732.401, FS which currently presents the statutory interpretive framework.

The subcommittee suggests certain modifications may be made to Section 732.401, FS to more broadly permit certain types of estate planning transfers which are "common" in the context of our planning.

**732.401. Descent of homestead**

(1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more children and (i) the decedent dies intestate, (ii) the decedent is survived by a minor child, (iii) or the decedent's will fails to make a disposition of the homestead, 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. If the decedent dies testate and there are no minor children, the suriving spouse shall take a life estate in the homestead, with a vested remainder to the beneficiaries in accordance with the terms of decedent's last will and testament (as if the spouse had predeceased).

(2) Subsection (1) shall not apply to property that the decedent and the surviving spouse owned as tenants by the entirety or as joint tenants with rights of survivorship.

(3) A disclaimer executed within nine (9) months of the decedent's death by the surviving spouse which meets the requirements of the Florida Uniform Disclaimer of Property Interests Act shall be effective as to the surviving spouse's interest in the decedent's homestead, and title shall pass in accordance with the decedent's last will and testament as if the surviving spouse had predeceased the decedent. If the decedent is survived by a minor child, a disclaimer by the surviving spouse shall vest title in the decedent's lineal descendants, per stirpes in accordance with subsection (1). However, if the decedent is not survived by a minor child, then the homestead property will not be subject to any restrictions on devise as the spouse will be treated as predeceased.

(4) If a minor child or children are entitled to a vested interest in homestead, a court of competent jurisdiction (probate court in the context of a guardianship proceeding) may approve the terms of a testamentary trust or an inter vivos trust under which the decedent was a settlor and in which the minor child or children are beneficiaries as a less-restrictive alternative or substitute for guardianship proceedings and transfer the homestead interest to said trustee to manage and protect the child's interest in the decedent's homestead. The court must make a specific finding that the trust terms are consistent with the best interests of said child or children. In particular, if a minor has special needs, a court should consider a devise to a Special Needs Trust as a satisfactory alternative to a guardianship proceeding.

**This proposal appears to provide the protections intended by the public policy behind the Constitutional Homestead devise restrictions while also affording a degree of planning flexibility for our clients. Further it should protect Special**

**Needs Trust planning for minor children (although probably not for surviving spouses with special needs).**

**If this proposal is adopted:**

**(1) the surviving spouse is guaranteed at least a life estate which could be partitioned if the reform to Chapter 64 is also adopted;**

**(2) the decedent's will or trust controls the disposition of the remainder interest if the decedent was not survived by a minor child. This reform would be helpful, for example, where a client wishes to leave a spouse a life estate but leave one of his/her 3 adult children the remainder – as opposed to the remainder passing equally to all 3 children. The proposed change would allow the spouse to receive the intended life estate and still permit the testator to dispose of the remainder to one of the children, for example; and**

**(3) confirms that a disclaimer by the surviving spouse results in the spouse being treated as if he/she predeceased the testator, and any otherwise valid attempted devise will be valid (e.g. when there are no minor children).**

### 3. Add a new Section 732.4017 to Clarify the Impact of the Homestead Laws on Inter Vivos Transfers in Trust

**Currently there is a great deal of confusion about the impact of the Homestead devise restrictions on homesteads devised during life. This issue is at the crux of the Cutler v. Cutler case (cited above) which is slated to be heard by the Florida Supreme Court.**

**Moreover, the lack of clarity regarding inter vivos transfers also impacts situations like Qualified Personal Residence Trusts where clients are incented (by gift tax reduction) to retain not only a term of years interest in the residence but also a contingent reversion in case the client dies during the term (which limits the value of the client's gift). But there is confusion as to whether the Homestead devise restrictions will come back and apply in the context of a client who dies during the QPRT term. While there is a strong argument that at the moment of death the client did not own a restricted homestead and the reversion takes effect "post-death" and thus can't revive the Homestead restrictions, there is no statutory or case law clearly holding such.**

**Finally, the lack of clarity makes the use of inter vivos planning for a minor child a risky proposition as well. To avoid the current restrictions on devise in the case of minors, some advisors advocate certain transfers to irrevocable trusts as effective mechanisms, but the Cutler case and other dicta make it impossible to accurately predict the effectiveness of such planning.**

The following proposal really only states the obvious: something that is irrevocably conveyed inter vivos cannot be devised at death. The proposed statute essentially states the obvious, and offers some examples that are intended to be helpful in showing what strings can be retained over a completed inter vivos transfer without causing it to become testamentary in nature. There is a draft discussion that follows the proposed statute.

732.4017 Inter vivos conveyance of homestead property. –

(1) If a person conveys an interest in homestead property during his or her lifetime, whether or not in trust, the conveyance shall not be a devise for purposes of s. 731.201(10) or s. 732.4015, and the interest conveyed shall not descend as provided in s. 732.401, if the person conveying the interest did not retain a power, held in any capacity, acting alone or in conjunction with any other person to revest that interest in himself or herself.

(2) A retained power to alter the beneficial use and enjoyment of the interest conveyed is not a power to revest the interest in the person conveying the interest if the power canont be exercised in favor of the person conveying the interest, his or her creditors, his or her estate, or the creditors of his or her estate.

(3) The conveyance of an interest in homestead property meeting the requirements of subsection (1) shall not be treated as a devise even if:

(a) the person conveying the interest retains a separate interest in the homestead property (whether directly or indirectly through a trust or other arrangement in which he or she has a beneficial interest);

(b) the interest conveyed will not become possessory in nature until the occurrence of a date certain, or until the occurrence or nonoccurrence of a specified event or condition; or

(c) the interest conveyed is subject to divestment, expiration, or lapse upon the occurrence of a date certain, or the occurrence or nonoccurrence of a specified event or condition.

Article X, section 4(c) of the Florida Constitution expressly permits the owner of homestead real estate, joined by the owner's spouse if married, to alienate homestead property by mortgage, sale or gift. As previously described herein, the Constitution only prohibits devises of homestead property if the owner is survived by a spouse or minor child. The term "devise" is defined in the Florida Probate Code, not in the Florida constitution. Section 732.201(10) defines a "devise" as a testamentary disposition of real or personal property.

The proposed statute makes it clear that an inter vivos conveyance of an interest in homestead property will not be considered a "devise," provided that certain conditions are met. If those conditions are met, an interest in homestead property that is conveyed inter vivos will not be subject to the restrictions on devise of homestead property upon death, because the interest will have been alienated for property law purposes during the homestead owner's lifetime and thus will not be owned for purposes of descent and devise upon death.

The following are examples of qualifying inter vivos conveyances that will avoid the constitutional and statutory restrictions on the devise of homestead property (whether or not the owner is survived by a spouse or minor child, assuming that all other conveyancing requirements have been met). It is assumed in each example that the homestead owner does not retain a power in any capacity, acting alone or in conjunction with any other person, to re-vest the conveyed interest in himself or herself.

A. An inter vivos conveyance to a qualified personal residence trust (within the meaning of section 2702 of the Internal Revenue Code).

B. An inter vivos conveyance of a remainder interest in homestead property (whether outright or in trust) following a life estate retained by the owner.

C. An inter vivos conveyance of a remainder interest in homestead property that is subject to complete divestment if the owner of the homestead property survives to a date that is specified in the instrument of conveyance, or if the conveyance is in trust, to a date that is specified in the trust instrument. (Example: a vested remainder interest that is subject to divestment if the person making the conveyance is still alive on a specified date, or that is subject to divestment if the person making the conveyance is not survived a minor child upon his or her death).

D. An inter vivos transfer where the owner of the interest being conveyed retains a "limited" power of appointment (whether inter vivos, testamentary, or both) over the conveyed interest, as long as the owner does not have the power acting alone (whether individually or in a fiduciary capacity) to revest the interest in himself or herself. The ability to exercise a power of appointment over the interest that was conveyed may be necessary to avoid gift tax consequences upon the inter vivos conveyance of that interest, by invoking the incomplete gift rules of section 2511 of the Internal Revenue Code.

**COMMITTEE MEMBERS PLEASE CONSIDER**: Further statutory amendments may be needed in chapter 193 and/or 196 governing real property taxation to make it clear that the conveyance of an interest permitted above does not cause the homestead owner's retained interest to be revalued for assessment purposes. Further thought and analysis is needed to determine if statutory provisions are needed to prohibit revaluation of the homestead property when the homestead owner's interest is terminated.

4. Statutory fix to Section 731.201(32)

In addition, the subcommittee would also recommend that we refer a few minor revisions to the Trust Law Committee to review. The proposed revisions to the Florida Trust Code would be adopted to provide clarity that protected homestead (as defined in Section 731.201(32), Florida Statutes) is not subject to administration or sale by the successor trustee of a revocable trust unless (1) the grantor/settlor is not survived by a spouse or minor child; and (2) the trust agreement specifically empowers the trustee to sell protected homestead. In addition, the law should be clarified to provide that the protected homestead is not available to pay expenses of administering the trust (including attorney fees).

These proposed statutory revisions should be referred to the Trust Law Committee for their review and comment.

V. Conclusion

The subcommittee recommends the RPPTL section consider a two-pronged approach to Homestead reform. First, the subcommittee believes the Committee and the section should consider if it supports seeking a total repeal of the Florida Constitution's restrictions on devise of homestead provided in Article X, Section 4(c). Second, and

perhaps while still working toward total repeal, the subcommittee recommends several statutory changes which together will help to alleviate some of the harms caused by the Homestead devise restrictions.

The proposed statutory changes will protect surviving spouses and descendants alike in a variety of situations where the current Constitutional and statutory provisions fail. The surviving spouses who may now be trapped in homesteads they no longer want would be afforded relief. Clients with a need to use the home for credit shelter planning, or who do not wish to benefit all children equally, or who have special needs planning issues (for a spouse or a child) will all benefit by these changes. Indeed, the changes will help most clients who bother doing their estate planning to have the opportunity to plan with the homestead in a manner consistent with the rest of their estate planning.

## Report of the Subcommittee on Notice of Administration
## Michael Dribben

## No written report provided

# Report of the Subcommittee on Paternity
# Anne Buzby

LEGISLATIVE POSITION REQUEST FORM GOVERNMENTAL AFFAIRS OFFICE **Date Form Received _____**

| GENERAL INFORMATION | |
|---|---|
| **Submitted By** | Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section |
| **Address** | Charles Ian Nash, Chair, 440 South Babcock Street, Melbourne, FL 32901;<br>Telephone: (321) 984-2440 |
| **Position Type** | Real Property Probate & Trust Law Section and its Probate Law Committee |

| CONTACTS | |
|---|---|
| **Board & Legislation Committee Appearance** | Burt Bruton, Legislative Chair<br>1221 Brickell Avenue, Miami, FL 33131 phone 305-579-0593 |
| **Appearances before Legislators** | Burt Bruton 305-579-0593; Martha Edenfield and Pete Dunbar 850-222-3533 |
| **Meetings with Legislators/staff** | Burt Bruton 305-579-0593; Martha Edenfield and Pete Dunbar 850-222-3533 |

## PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

**If Applicable, List The Following**

(Bill or PCB #) (Bill or PCB Sponsor)

| **Indicate Position** | **XX** Support | Oppose | Technical Assistance | Other |
|---|---|---|---|---|

**Proposed Wording of Position for Official Publication** Amends Section 732.108(2) to provide that Chapter 95, Florida Statutes does not apply to actions to establish paternity under Section 732.108(2) after the death of the alleged father.

**Reasons For Proposed Advocacy** Section 732.108(2), Florida Statutes provides a mechanism whereby persons born out of wedlock or their descendants can establish entitlement to a share of a decedent's estate. However, Estate of Smith, 685 So. 2d 1206 (Fla. 1996) held that the 4 year statute of limitations under Section 95.11(3)(b), Florida Statutes applies to determinations of paternity under Section 732.108(2). Because most fathers do not die within 4 years of a child reaching majority, this statute creates an empty right. Therefore, it is necessary to modify existing law to provide that Chapter 95, Florida Statutes does not apply to actions to establish paternity under Section 732.108(2) after the death of the alleged father.

## PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

**Most Recent Position** None
(Indicate Bar or Name Section) (Support or Oppose) (Date)

**Others**
(May attach list if more than one ) None
(Indicate Bar or Name Section) (Support or Oppose) (Date)

## REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

he Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

**Referrals**

1.
Name of Group or Organization) (Support, Oppose or No Position)

2.
(Name of Group or Organization) (Support, Oppose or No Position)

3.

(Name of Group or Organization) (Support, Oppose or No Position)

**Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.**

732.108 Adopted persons and persons born out of wedlock.--
(1) For the purpose of intestate succession by or from an adopted person, the adopted person is a descendant of the adopting parent and is one of the natural kindred of all members of the adopting parent's family, and is not a descendant of his or her natural parents, nor is he or she one of the kindred of any member of the natural parent's family or any prior adoptive parent's family, except that:

(a) Adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and the natural parent or the natural parent's family.

(b) Adoption of a child by a natural parent's spouse who married the natural parent after the death of the other natural parent has no effect on the relationship between the child and the family of the deceased natural parent.

(c) Adoption of a child by a close relative, as defined in s. 63.172(2), has no effect on the relationship between the child and the families of the deceased natural parents.

(2) For the purpose of intestate succession in cases not covered by subsection (1), a person born out of wedlock is a descendant of his or her mother and is one of the natural kindred of all members of the mother's family. The person is also a descendant of his or her father and is one of the natural kindred of all members of the father's family, if:

(a) The natural parents participated in a marriage ceremony before or after the birth of the person born out of wedlock, even though the attempted marriage is void.

(b) The paternity of the father is established by an adjudication before or after the death of the father.

(c) The paternity of the father is acknowledged in writing by the father.

(3) In an action to establish paternity after the death of the alleged father under paragraph (b) of subsection (2), Chapter 95 shall not apply.

**History.**--s. 1, ch. 74-106; s. 11, ch. 75-220; s. 7, ch. 77-87; s. 1, ch. 77-174; s. 2, ch. 87-27; s. 954, ch. 97-102, ch 2007-74.

**Note.**--Created from former ss. 731.29, 731.30.

# Report of the Subcommittee on Claim to Decedent's Remains
# Shane Kelley and Keith S. Kromash

## Proposed New Statute for Disposition of Human Remains

732.804. Provisions relating to disposition of decedent's last remains.

(1) Any person **[SHOULD WE HAVE A LIMIT ON WHO CAN DO THIS - who is either 18 or more years of age or an emancipated minor]** may specify, in a written declaration, any one or more of the following:

(a) The disposition to be made of the his or her last remains, including whether the disposition shall be by burial or cremation;

(b) The person appointed to direct the disposition of decedent's last remains;

(c) The ceremonial arrangements to be performed after death;

(d) The person appointed to direct the ceremonial arrangements after death.

(2) A written declaration created under this Section must be dated and shall be signed by the person making the declaration. If the person making the declaration cannot sign, the written declaration may be signed for him or her by some other person in their presence and at their direction.

(3) The provisions of the most recent written declaration shall control over any other document regarding any matter addressed in paragraph (1) of this Section.

(4) If any written declaration is in conflict with any anatomical gift established in accordance with the provisions of s. 765.514, the written declaration created in accordance with the provisions of this Section shall govern.

(5) Unless a written declaration specifically appoints a person to direct the disposition of a decedent's last remains, any person may carry out the disposition of decedent's last remains pursuant to the terms of a written declaration either before or after issuance of letters of administration.

(6) A third party shall provide for the lawful disposition of the last remains according to the written declaration provided that:

(a) The third party does not have actual knowledge of the pendency of a legal action brought to challenge the validity of the written declaration;

(b) The third party does not have actual knowledge of another written direction which is dated later than the written declaration in possession of the third party; and

(c) The decedent provided the resources necessary to carry out the disposition or another person has agreed to incur the expense.

(7) A third party who has knowledge that a legal action has been brought to challenge a written declaration shall not be liable for refusing to accept, inter, cremate, or otherwise dispose of a decedent's remains until the third party receives a court order or other reasonable confirmation that the legal action has been resolved or settled.

(8) A third party who directs or provides for the lawful disposition of a decedent's remains, including cremation, in reliance on a written declaration created in accordance with the provisions of this Section that appears to be legally executed shall not be subject to civil liability or administrative discipline for such actions absent bad faith.

(9) In any legal proceeding brought under this Section, admission of a written declaration creates a rebuttable presumption that the written declaration represents the decedent's intent with respect to any matter addressed in paragraph (1) of this Section.

(10) In the absence of a written direction executed as provided in this Section, the right to control disposition of the last remains or ceremonial arrangements of a decedent vests in and devolves upon the following persons, at the time of the decedent's death, in the following order of preference:

(a) the decedent, if the decedent's intent can be proven by a preponderance of the evidence in an appropriate legal proceeding **[SHOULD THERE BE A TIME LIMIT ON BRINGING SUCH AN ACTION?]**

(b) the surviving spouse;

(c) a majority the children of the decedent who are 18 years of age or older;

(d) a majority of the surviving parents of the decedent;

(e) a majority of the surviving siblings of the decedent who are 18 years of age or older;

(f) a majority of the surviving grandchildren of the decedent who are 18 years of age or older;

(g) a majority of the surviving grandparents of the decedent;.

(h) the guardian of the person or property of the decedent at the time of death;

(i) the personal representative of the decedent;

(j) the attorney in fact of the decedent at the time of death;

(k) the health care surrogate of the decedent at the time of death;

(l) a public health officer;

(m) the medical examiner, county commission, or administrator acting under part II of chapter 406 or other public administrator;

(n) a representative of a nursing home in which the decedent resided at the time of death; or

(o) any person 18 years of age or older not listed in this subsection who is willing to assume the legal and financial responsibility for the final disposition of the decedent's last remains.

(11) If any person unlawfully and intentionally kills or participates in procuring the death of the decedent, that person shall not be entitled to control the disposition of the last remains or the ceremonial arrangements of a decedent. A final judgment of conviction of murder in any degree is conclusive for purposes of this Section. In the absence of a conviction of murder in any degree, the court may determine by the greater weight of the evidence whether the person unlawfully and intentionally killed or participated in procuring the death of the decedent for purposes of this Section.

(12) (a) If the person with the right to control disposition pursuant to paragraph (10) of this Section is unable or unwilling to make such disposition, or if the person's whereabouts cannot be reasonably ascertained, that person's rights shall terminate and pass to the following persons, in the following order of preference:

i) The rest of the persons in the class with the same degree of relationship granting the same priority of control over the disposition pursuant to Paragraph (10) of this Section;

ii) The next class of persons in the order listed in Paragraph (10) of this Section.

(b) The person with the right to control disposition shall be presumed to be unable or unwilling to provide for such disposition, or the person's whereabouts shall be presumed unknown, if the person has failed to make final arrangements for the disposition of the decedent within five (5) days after receiving notice of the decedent's death or within ten (10) days after the decedent's death, whichever is earlier.

(c) If a person is unable or unwilling to make a disposition, such person shall not be counted as a member of the class when determining the number that makes a majority of such class.

(13) Venue for an action pursuant to this Section may be laid in:

(a) Any county where the venue is proper under chapter 47; or

(b) Any county in which the decedent was physically present as of the date of his or her death, or

(c) Any county in which a probate proceeding for the decedent is pending.

(14) A third party who provides for the final disposition of a decedent's remains upon authorization from a person who claimed to have the right to control the final disposition pursuant to paragraph (10) of this Section shall be immune from civil liability and administrative discipline absent bad faith on the part of the third party.

*******Also propose to repeal F.S. 732.804 and all or portions of F.S. 497.005(37) and amend portions of F.S. 406.50

# UNIFORM PROBATE CODE PROVISION

**Deposit of will with court in testator's lifetime.** A will may be deposited by the testator or the testator's agent with any court for safekeeping, under rules of the court. The will must be sealed and kept confidential. During the testator's lifetime, a deposited will may be delivered only to the testator or to a person authorized in writing signed by the testator to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible and to ensure that it will be resealed and kept on deposit after the examination. Upon being informed of the testator's death, the court shall notify any person designated to receive the will and deliver it to that person on request or the court may deliver the will to the appropriate court.

**There is no Subcommittee Chair relative to this Matter**

No Report

**Proposed Revision of Florida Statute 732.402 as approved by our committee**

732.402 Exempt property.--

(2) Exempt property shall consist of:

(a) Household furniture, furnishings, and appliances in the decedent's usual place of abode up to a net value of $2~~1~~0,000 as of the date of death.

(b) Two ~~All automobiles~~ motor vehicles as defined in s. 316.003(21) which do not, individually as to either such motor vehicle, have a gross vehicle weight in excess of 15,000 pounds, held in the decedent's name and regularly used by the decedent or members of the decedent's immediate family as their personal ~~automobiles~~ motor vehicles.

(c) All ~~Stanley G. Tate Florida Prepaid College Program contracts purchased and Florida College Savings agreements established under part IV of chapter 1009~~ qualified tuition programs authorized by s. 529 of the Internal Revenue Code of 1986, as amended, including, but not limited to, the Florida Prepaid College Trust Fund advance payment contracts under s 1009.98 and Florida Prepaid College Trust Fund participation agreements under s. 1009.981.

(d) All benefits paid pursuant to s. 112.1815.

**2008 Key West meeting Action Item under General Standing:**

If the Supreme Court of Florida exercises its discretionary jurisdiction to take the case, authorize the Section to appear as amicus in *In re: Estate of Magee* to take a position in support of Florida's elective share.

**WHITE PAPER**

IN SUPPORT OF THE SECTION'S PARTICIPATION AS *AMICUS* IN

*IN RE: ESTATE OF MAGEE*

**BY**

**ROHAN KELLEY**

**Background Information**

The issue before us is whether the Section should petition to appear as amicus in the Florida Supreme Court if the Court decides to review the decision of the Second District Court of Appeal in *In re: Estate of Magee*, 32 Fla. L. Weekly D 2307 (Fla. 2d DCA Sept. 26, 2007) which recently upheld the constitutionality of Florida's elective share statute. Copies of the *Magee* decision and the related decision in *Shriners Hospitals for Crippled Children v. Zirillic* , 563 So. 2d 64 (Fla. 1991) are attached.

In *Magee*, the Petitioner attacks Florida's elective share statute on several constitutional grounds under the Florida and US Constitutions. The focus of the Second District's opinion was Article I, section 2 of the Florida Constitution:

> SECTION 2. Basic rights.--All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and *to acquire, possess and protect property: except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law.* No person shall be deprived of any right because of race, religion or physical handicap. (Emphasis Added).

*Zirillic*, in a 4 to 3 decision, was the first Florida case to recede from the substantial weight of authority holding that the right to devise is a creature of statute, instead holding that the right to devise is a constitutional property right under Article I, section 2. Petitioner, in *Magee*, argues, as first held in *Zirillic*, that the right to devise is a constitutional property right (see the italicized portion of section 2, above). After finding the right to devise to be a constitutional right, *Zirillic* stopped short of deciding whether the property right to devise property fell into the special category of "fundamental rights" to which a higher test, such as the "strict scrutiny" test, would apply. In *Zirillic* in footnote 6, the court said: "Although the express constitutional property right at issue in the instant case may well qualify for application of a more stringent test [the strict scrutiny test], we need not address that issue because the charitable devise restriction in

section 732.803 fails to satisfy even the rational basis test." Bill Belcher and Jay Fleece were counsel in *Zirillic.*

The *Zirillic* opinion provides an excellent historical perspective on the right to devise. Also see WikipediA at http://en.wikipedia.org/wiki/Statute_of_wills.

> **The Statute of Wills** (enacted in 1540) was an Act of the Parliament of England (32 Hen. 8, c. 1). It made it possible, for the first time in English history, for landholders to determine who would inherit their land upon death, by permitting bequest by will. Prior to the enactment of this statute, land could only be passed by descent (if and when the landholder had competent living relatives who survived him) and was subject to the harsh rules of primogeniture. When a landholder died without any living relatives, his land would escheat to the Crown. The statute was something of a political compromise between Henry VIII and English landowners, who were growing increasingly frustrated with primogeniture and royal control of land.

This origin of that right as a statutory right, rather than a fundamental right, has been and continues to be recognized by decisions in 48 of the 50 states, Wisconsin, and now Florida, being the exceptions. (Note that Wisconsin is a community property state.)

If the right to devise is a progeny of statute, it can be regulated and modified by changing the statuteto meet the changing needs of society. If it is a constitutional property right, it can only be regulated or modified by changing the constitution or by a statute which meets the appropriate level of constitutional review. Many of our existing statutes which touch the right to devise property *may be significantly affected by the outcome of this case*.

Petitioner emphasizes that the statute (which gives 30% of the augmented estate to the surviving spouse) includes the same benefits for needy surviving spouses as for surviving spouses who are as rich as Croesus (petitioner actually argues "as rich as Bill Gates"). She argues that since the elective share is not need-based, it cannot be upheld as serving the valid purpose of protecting potentially-destitute surviving spouses and their children. It must therefore fail even the "rational basis" test (not to mention the "strict scrutiny" test), she contends, and is therefore unconstitutional. Petitioner argues that the Florida elective share statute, unlike the Uniform Probate Code elective share, does not consider the surviving spouse's other assets, and therefore does not determine need. *Ergo*, the argument goes, the Florida elective share statute is unconstitutional. The 2d DCA rejected this argument concluding that a recent decision from the Florida Supreme Court indicated that the lower rational basis test applied and that the elective share met that standard of review.

This brings us to the apparent options available to the Section in this matter:

1. **Participate and do not contest that the right to devise is a constitutional property right and argue that the elective share statute meets which ever test applies.** As the 2d DCA determined in the *Magee* opinion, "a statute is valid if it 'bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory, arbitrary, or oppressive.'"

However, the *Magee* opinion does not say what the "legitimate legislative purpose" of the elective share statute is . The entire text of the 2d DCA opinion devoted to this discussion is as follows (notice the absence of any detailed analysis of the legitimate legislative purpose" for this statute):

> . . . this state has a "strong public policy concerning the protection of the surviving spouse of [a] marriage in existence at the time of the decedent's death." See *Via*, 656 So. 2d at 461. The provisions of the elective share statute thus serve a legitimate legislative purpose. The statutes are rationally related to that purpose in that they seek to provide any surviving spouse who has not waived such protections a minority share in the assets of the decedent in the event that spouse did not receive as much through testamentary dispositions. FN3 This legislative scheme has strong historical roots in the common law, in existence before the enactment of our state constitution and undisturbed until now.
>
> FN3. To the extent the amount of the elective share reflects a proportion of the spouse's estate, these provisions mimic to a certain extent the protections afforded to a spouse in a divorce who may be awarded alimony as possible and necessary to maintain the standard of living established during a marriage, not solely to protect that spouse from impoverishment. See § 61.08(2)(a), Fla. Stat. (2006).

It should not be overlooked that the *Magee* opinion did not even address the possible application of the more stringent "strict scrutiny" test although the point was briefed and argued.

2. **Participate and ask the court to recede from *Zirillic*, hold that the right to devise property is not a constitutional right, and uphold the validity of the elective share statute.** This argument is the more drastic and dramatic of the other two options. It would suggest that the holding in *Zirillic* is far outside the mainstream of U.S. jurisprudence, unnecessary and without purpose. There has never been a showing that state legislatures have not been fairly treating their citizenry with respect to the right to devise property from the moment we became a sovereign nation. Under this view, there was simply no purpose or need for *Zirillic* to recharacterize this right and elevate it to that of a constitutional property right. The point made by the *Magee* court that "This legislative scheme has strong historical roots in the common law, in existence before the enactment of our state constitution and undisturbed until now" may be an even stronger argument for the fact that the right to devise property is not a constitutional right than for the proposition that there is a "rational basis" for the statute.

If the Section selects this option, it may be a source of concern to some, (including the judiciary) that we could be ignoring the concept of *stare decisis*, which is a major

cornerstone of our justice system. (See an interesting discussion of this concept in the very recent opinion of the Supreme Court in *Chames v. Demayo*, especially in the context of the court refusing to retreat from its 123 year old opinion to adopt a minority view present in a few states.) Perhaps that concern would be tempered by the prospect that our position serves the public interest by returning to the certainty of centuries of precedent and finding that the legislature, elected by and answerable to the people, has a perfect right by adopting the Florida elective share to modify or limit the right of inheritance which it granted in the first instance.

Those who oppose this approach may argue that the value of *stare decisis* to the justice system outweighs even the argument that Justice Barkett was wrong in the first place, and after all, Floridians can live with the right to devise as a property right. Perhaps it might even be a good thing. Further, there is no need to make this argument because the elective share statute may pass constitutional review. After all, that position prevailed both at the trial level and in the 2d DCA. Even if that fails, the legislature can rewrite the elective share statute to incorporate the full augmented estate concept from the UPC (where the surviving spouse's assets are also valued for this purpose).

3**. Do not participate, take no position and allow the parties to pursue this to a conclusion.** For an issue of this importance, where there are not divisive views within The Florida Bar, we would typically become involved as an *amicus.*

**In re Estate of Robert W. Magee, deceased, JUDITH MAGEE, individually and as Trustee of the Robert W. Magee Revocable Trust U/T/D 10/21/94, Appellant, v. EDNA MAGEE, Appellee.**

**Case No. 2D06-3692**

**COURT OF APPEAL OF FLORIDA, SECOND DISTRICT**

***2007 Fla. App. LEXIS 15163*; *32 Fla. L. Weekly D 2307***

**September 26, 2007, Opinion Filed**

**PRIOR HISTORY:** [*1]
Appeal from the Circuit Court for Pinellas County; George W. Greer, Judge.

**COUNSEL:** Robert W. Goldman of Goldman Felcoski & Stone, P.A., Naples, for Appellant.

Joseph W. Fleece, III, of Baskin-Fleece, and Ray Peacock of Peacock & Gaffney, Clearwater, for Appellee.

**JUDGES:** ALTENBERND, Judge. SALCINES, J., and THREADGILL, EDWARD F., SENIOR JUDGE, Concur.

**OPINION BY:** ALTENBERND

**OPINION**

ALTENBERND, Judge.

Judith Magee (Judith) appeals an order entered in a probate proceeding regarding her father, Robert W. Magee, that determines Edna Magee's right as a surviving spouse to an elective share of Mr. Magee's estate. The order expressly declares that Florida's elective share statutes, codified at *sections 732.201 to 732.2155, Florida Statutes* (2002), are constitutional under the United States and Florida Constitutions. Based upon the record and the arguments presented, we affirm.

Robert and Edna Magee were married on January 2, 1994. At the time, both of them were in their seventies. Thereafter, on October 21, 1994, Mr. Magee executed the Robert W. Magee Revocable Inter Vivos Trust. Mr. Magee was the grantor of the trust and the trustee during his lifetime. According to the terms of the trust, upon Mr. Magee's death, his wife Edna would [*2] act as successor trustee if able, and the assets and income of the trust were to be distributed in equal thirds to his wife Edna, his daughter Judith, and to another of Mr. Magee's daughters. [1] Judith was to act as successor trustee in the event Edna was unable to fulfill that role.

1 In the event any of these beneficiaries predeceased Mr. Magee, the trust provided, "[S]aid deceased beneficiary's distributive share shall pass to her lineal descendants who survive [Mr. Magee], per stirpes; but if there are no such living lineal descendants, then to the other named beneficiaries per stirpes, if living, or their lineal descendants if the other named beneficiaries are not living." Apparently, Mr. Magee's other daughter predeceased him.

For reasons not explained in this record, Mr. Magee amended the trust on December 13, 2001. In the amendment, Mr. Magee removed Edna as a successor trustee and placed Judith in that role. The trust also removed Edna as a beneficiary and instead provided that Judith would receive one-half of the trust assets and income upon Mr. Magee's death, and that two of Mr. Magee's grandchildren would each receive one-fourth of the remaining trust assets and income. Notably, [*3] this amendment was made well after substantial revisions were made to Florida's elective share statutes in 1999 and after the date those statutes applied to any decedent. *See* ch. 99-343, Laws of Fla.; *§ 732.2155(1), Fla. Stat.* (2001) (providing that the amendments to the elective share provisions are effective as of October 1, 1999, but only apply to decedents dying after October 1, 2001). We must therefore assume that the changes Mr. Magee made to his trust with the assistance of counsel were made with knowledge of the changes in the statutes governing elective share then in effect.

Edna Magee and Robert Magee remained married until Mr. Magee died on December 15, 2002. Edna filed a petition for administration of Mr. Magee's estate and a notice of

her intent to seek the elective share. Judith was provided formal notice of these proceedings and objected to the election, arguing that the elective share statutes are unconstitutional under the Florida and United States Constitutions. The probate court rejected this assertion and determined that Edna was entitled to an elective share in accordance with the provisions of *sections 732.201 to 732.2155*. After further proceedings, the probate [*4] court entered a final order determining that Edna was entitled to the amount of $ 560,739.15 as her elective share of Mr. Magee's elective estate and designating how the share would be distributed to Edna.

We reject without further discussion Judith's argument that the probate court erred in the calculation of the elective share. We also reject her assertion that Florida's elective share statutes violate the *Due Process Clause of the United States Constitution.* Despite the prevalence of elective share statutes and related provisions regarding dower and curtesy throughout the country, Judith has pointed to no case law holding an elective share or similar statute unconstitutional for violating the *Due Process Clause of the United States Constitution.* Further, we conclude that the amended elective share statutes cannot be said to impair any contractual rights in this case, given that the substantive trust provisions at issue were amended after the effective date of the statutory amendments at a time when Mr. Magee should have been aware or advised of the changes in the law and the implications the amendments would have on his attempts to change the terms of his trust. Judith's argument [*5] that the elective share statutes violate *article I, section 2 of the Florida Constitution*, however, merits some discussion.

*Article I, section 2 of the Florida Constitution* provides to all persons "the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law."

As noted in *Shriners Hospital for Crippled Children v. Zrillic, 563 So. 2d 64 (Fla. 1990),* decisions in Florida and in other jurisdictions historically recognized a distinction in the protections to be afforded to property rights versus those afforded to testamentary rights. "The distinction those courts have drawn is that property rights are inalienable rights grounded in natural law, whereas freedom of testation is purely a creation of statute that did not exist at common law." *Id. at 67*; *see also* Evin Netzer, *Florida Constitutional Law: Demise of the Common Law Distinction Between Testamentary and Property Rights,* 43 Fla. L. Rev. 153, 156 (Jan. 1991) ("[C]ourts historically have viewed testamentary [*6] rights as emanating from the legislature, and other real property rights as being fundamental.").

In *Zrillic,* however, the Florida Supreme Court rejected this dichotomy as arising from "long-abandoned feudal notions of property" and concluded that the testamentary disposition of property was "a specifically expressed [Florida] constitutional property right." *Zrillic, 563 So. 2d at 67-68*. The court thus afforded testamentary rights the same constitutional protections normally provided to other real property rights.

The specific question presented in *Zrillic* was whether Florida's mortmain statute, then codified at section 732.803, Florida Statutes (1985), violated *article 1, section 2 of the Florida Constitution* by impermissibly infringing on the decedent's testamentary

rights. Generally speaking, the mortmain statute provided that a lineal descendant or spouse could set aside or avoid a testamentary devise that a decedent made to a charitable organization shortly before the decedent's death, thus redirecting that devise back into the probate estate, presumably for the benefit of that descendant or spouse. In *Zrillic*, the decedent, shortly before her death from a lingering illness, had [*7] expressly sought to disinherit her "promiscuous" daughter in favor of providing the residue of her estate to the Shriners Hospital for Crippled Children. *563 So. 2d at 65-66*.

The Florida Supreme Court held that the mortmain statute violated the expressed constitutional right provided by *article I, section 2*, to "acquire, possess and protect property." *Id. at 66-69* (quoting *art. I, § 2, Fla. Const.*). The court acknowledged that these rights are not absolute. Rather, they are "held subject to the fair exercise of the power inherent in the State to promote the general welfare of the people through regulations that are reasonably necessary to secure the health, safety, good order [and] general welfare." *Id. at 68* (quoting *Golden v. McCarty, 337 So. 2d 388, 390 (Fla. 1976)*). The court thus framed the issue as "*whether section 732.803 is reasonably necessary* to limit the property rights guaranteed by *article 1, section 2 of the Florida Constitution*." *563 So. 2d at 68* (emphasis added).

In addressing whether the mortmain statute was "reasonably necessary," the court first examined the rationales provided for the statute. The court explained that although charitable devises were once disfavored [*8] because of certain prevalent abuses, society's attitudes toward charitable devises had changed and such devises were viewed in a more favorable light. As such, the only remaining rationales behind the mortmain statute were to protect a testator's family from disinheritance and to prevent undue influence by a charitable organization over a testator "under the apprehension of impending death." *Zrillic, 563 So. 2d at 69*. The court rejected these rationales. "Although it may be reasonable for the legislature to protect family members who are dependent or in financial need, it is unreasonable to presume, as the statute seems to do, that all lineal descendants are dependents, in need, or are not otherwise provided for." *Id.* Further, the court noted, "Florida law is replete with protections for surviving family members who may have been dependent on the testator," including the elective share. *Id.* In addition, the court found adequate protections within the Probate Code to protect against concerns of undue influence. Finally, the court concluded, "The statute is not *reasonably necessary to accomplish the asserted state goals* at the cost of offending property interests protected by the Florida [*9] Constitution." *Id.* (emphasis added).

Judith argues that the principles established in *Zrillic* apply to invalidate Florida's current elective share statutes. Essentially, she interprets *Zrillic* as recognizing a fundamental right to devise of one's property through testamentary instruments that can only be curtailed by the government through a narrowly tailored law when the law is "reasonably necessary to secure the health, safety, good order [and] general welfare." *See Zrillic, 563 So. 2d at 68* (citing *Golden, 337 So. 2d at 390*); *see also Dep't of Law Enforcement v. Real Property, 588 So. 2d 957, 964 (Fla. 1991)* (citing *Zrillic* for the proposition that *article I, section 2*, protects all incidents of property ownership from infringement by the state unless regulations are "reasonably necessary" to secure public welfare; holding that the state must employ the "least restrictive alternative" to achieve its legitimate objectives where such rights are at stake); *In re Forfeiture of 1969 Piper*

*Navajo, 592 So. 2d 233, 236 (Fla. 1992)* (invalidating statute because it was not "narrowly tailored" to the state's objectives; "[S]o long as the public welfare is protected, every person in Florida [*10] enjoys the right to possess property free from unreasonable government influence."). Judith recognizes Florida's long-held and legitimate public policy of protecting the financial security of surviving spouses, *see Via v. Putnam, 656 So. 2d 460, 461 (Fla. 1995)*, but argues that the elective share statutes are not sufficiently narrowly tailored to further this policy, particularly because they apply regardless of the perceived needs of the surviving spouse.

There is no doubt that some of Justice Barkett's language in *Zrillic* seems expansive enough to support the arguments made here. [2] That language was taken from *Golden, 337 So. 2d 388*, wherein the Florida Supreme Court explained:

> All contract and property rights are held subject to the fair exercise of the power inherent in the State to promote the general welfare of the people *through regulations that are reasonably necessary to secure the health, safety, good order, general welfare.* "And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law." *Atlantic Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548, at 558, 34 S. Ct. 364 at 368, 58 L. Ed. 721 (1914).* [*11] Appellant submits and we agree that the constitutional right of every person to pursue a business, occupation, or profession is subject to the paramount right of government through the police power to impose *reasonable restrictions as may be required for the protection of the public.*

*Id. at 390* (emphasis added).

> 2 Indeed, it is the expanse of the holding on the constitutional protection afforded to testamentary rights that seems to have led Justices Grimes, McDonald, and Overton to concur in the result of the opinion but not in the constitutional analysis applied pursuant to *article I, section 2 of the Florida Constitution. Zrillic, 563 So. 2d at 71-73* (Grimes, concurring; McDonald, concurring in result, dissenting in part). Broadly applied, the language in *Zrillic* had the potential to shift the balance of power from the legislature to the courts based upon a state constitutional provision, creating a political environment similar to that which existed during the *Lochner* era under the federal doctrine of economic substantive due process. *See, e.g., Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 72 S. Ct. 405, 96 L. Ed. 469 (1952)* (criticizing *Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), Coppage v. Kansas, 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915),* [*12] and *Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923),* and stating: "Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits . . . [b]ut the state legislatures have constitutional authority to experiment

with new techniques; they are entitled to their own standard of the public welfare . . . .")

The problem with the quote in *Golden,* however, as evidenced by its application in *Zrillic,* is that the language used permits two possible distinct analyses using the same concept of "reasonableness": whether regulations are "reasonably necessary" to protect the general welfare versus whether a regulation is a "reasonable restriction as may be required for the protection of the public." *Golden, 337 So. 2d at 390*. Whether a statute is "reasonably necessary" to protect the public may be a far more rigorous analysis than whether a statute is a "reasonable restriction" on certain property rights to promote a legitimate government purpose.

Fortunately, the Florida Supreme Court has recently clarified that the test to be applied in [*13] evaluating statutes and regulations that infringe on property rights or testamentary rights--at least those that do not require the absolute destruction of property--is not the "least restrictive means" test urged by Judith here, but rather a "reasonable relationship" test. In *Haire v. Florida Department of Agriculture & Consumer Services, 870 So. 2d 774, 783 (Fla. 2004),* the court explained,

> [W]e have held that "[a]ll . . . *property rights* are held subject to the fair exercise of the [police] power," *Golden v. McCarty, 337 So. 2d 388, 390 (Fla. 1976)* (emphasis supplied), and have used the reasonable relationship test . . . to evaluate statutes and regulations that infringe on property rights.

*Id.* (footnotes omitted).

As support for this proposition, the court expressly cited *Zrillic*. *Haire, 870 So. 2d 783 n.9*. In reconciling the cases, therefore, the Florida Supreme Court has now established that the "reasonable relationship" or "rational basis" standard applies to review a statute that potentially infringes on (but does not destroy entirely) property or testamentary rights.

As further explained in *Haire,*

> Under this standard of review . . . a "state statute must be upheld . . . if there [*14] is *any* reasonable relationship between the act and the furtherance of a valid governmental objective." *Lane v. Chiles, 698 So. 2d 260, 262 (Fla. 1997)* (emphasis supplied). Specifically, with respect to substantive due process, a statute is valid if it "bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory, arbitrary, or oppressive." *Chicago Title Ins. Co. v. Butler, 770 So. 2d 1210, 1215 (Fla. 2000).*

*870 So. 2d at 782*.

As noted above and acknowledged by Judith, this state has a "strong public policy concerning the protection of the surviving spouse of [a] marriage in existence at the time

of the decedent's death." *See Via, 656 So. 2d at 461*. The provisions of the elective share statute thus serve a legitimate legislative purpose. The statutes are rationally related to that purpose in that they seek to provide any surviving spouse who has not waived such protections a minority share in the assets of the decedent in the event that spouse did not receive as much through testamentary dispositions. [3] This legislative scheme has strong historical roots in the common law, in existence before the [*15] enactment of our state constitution and undisturbed until now.

3 To the extent the amount of the elective share reflects a proportion of the spouse's estate, these provisions mimic to a certain extent the protections afforded to a spouse in a divorce who may be awarded alimony as possible and necessary to maintain the standard of living established during a marriage, not solely to protect that spouse from impoverishment. *See § 61.08(2)(a), Fla. Stat.* (2006).

We therefore affirm the order on appeal.

SALCINES, J., and THREADGILL, EDWARD F., SENIOR JUDGE, Concur.

LEXSEE 563 SO. 2D 64

**SHRINERS HOSPITALS FOR CRIPPLED CHILDREN, Petitioner, v. LORRAINE E. ZRILLIC, Respondent. ESTATE OF LORRAINE E. ROMANS, Petitioner, v. LORRAINE E. ZRILLIC, Respondent**

**Nos. 73,639, 73,640**

**Supreme Court of Florida**

***563 So. 2d 64; 1990 Fla. LEXIS 746; 15 Fla. L. Weekly S 316***

**May 31, 1990**

**PRIOR HISTORY:** [**1] Two Cases Consolidated; Applications for Review of the Decision of the District Court of Appeal - Statutory Validity; Fifth District - Case No. 88-49; (Seminole County).

**COUNSEL:** William S. Belcher of Belcher & Fleece, P.A., St. Petersburg, Florida and Joseph W. Fleece, III, St. Petersburg, Florida, for Shriners Hospitals for Crippled Children.

Lawrence E. Dolan of Lawrence E. Dolan, P.A., Orlando, Florida, for Estate of Lorraine E. Romans, Petitioners.

Peggy Tribbett Gehl and Linda Chambliss, Ft. Lauderdale, Florida; and Joseph C. Jacobs of Ervin, Varn, Jacobs, Odom & Ervin, Tallahassee, Florida, for Respondent.

**JUDGES:** Barkett, J. Ehrlich, C.J., and Shaw and Kogan, JJ., concur, Grimes, J., concurs in result with an opinion, McDonald, J., concurs is result and dissents in part with an opinion, in which Overton, J., concurs.

**OPINION BY:** BARKETT

**OPINION**

[*65] We have consolidated for review two cases that arose out of *Zrillic v. Estate of Romans, 535 So.2d 294 (Fla. 5th DCA 1988)*. One presents an issue concerning the district court's express declaration of validity of section 732.803 of the Florida Statutes (1985), which pertains to charitable devises. [1] The other alleges an express and direct [**2] conflict with *Hooper v. Stokes, 107 Fla. 607, 145 So. 855 (1933)*; *Milam v. Davis, 97 Fla. 916, 123 So. 668, cert. denied, 280 U.S. 601, 50 S. Ct. 82, 74 L. Ed. 646 (1929)*, and *In re Estate of Herman, 427 So.2d 195 (Fla. 4th DCA 1982)*. [2]

1 This section is commonly known as Florida's mortmain statute.

2 We have jurisdiction pursuant to *article V, section 3(b)(3) of the Florida Constitution.*

I.

Lorraine E. Romans, a resident of Seminole County, Florida, executed her Last Will and Testament on May 5, 1986. After suffering from a lingering illness, she died on July 19, 1986, survived by her daughter, Lorraine E. Zrillic. The testator's will, admitted to probate on December 19, 1986, included the following provisions:

EIGHTH: I give and bequeath several sealed boxes of family antique dishes and figurines specifically designated, to my daughter, LORRAINE E. ZRILLIC, 16531 Blatt Blvd., No. [**3] 204, Ft. Lauderdale, Florida. I have intentionally limited her inheritance since I have contributed substantially during my life for her education and subsequent monies I have been required to expend primarily due to her promiscuous type of life. My daughter, LORRAINE E. ZRILLIC has not shown or indicated the slightest affection or gratitude to me for at least five years preceeding [sic] the date of this Will. My executor will know the appraised value of these antiques for estate tax purposes. . . .

ELEVENTH: All the rest residue and remainder of my estate, of whatever nature and wherever situated of which I may be siezed [sic] or possessed or to which I may be entitled at the time of my death, including lapsed legacies and any property over which I have a power of appointment I give, devise and bequeath as a charitable donation to the SHRINERS HOSPITAL[S] for CRIPPLED CHILDREN. . . .

Pursuant to section 732.803, [3] Zrillic timely requested the circuit court to issue an order avoiding the charitable devise. Timely responses were filed

by: Shriners Hospitals [*66] for Crippled Children (petitioner in No. 73,639); and James C. Lloyd, James G. Erdman, and Betty C. Merrick, [**4] as copersonal representatives of the Estate of Lorraine E. Romans (petitioners in No. 73,640). Copetitioners filed the same two affirmative defenses in the circuit court, alleging that: (1) Zrillic lacked standing to avoid the charitable devise because she was expressly disinherited; and (2) section 732.803 violated the equal protection provisions of the constitutions of the United States and the state of Florida.

3 Section 732.803 of the Florida Statutes (1985), provides:

> (1) If a testator dies leaving lineal descendants or a spouse and his will devises part or all of the testator's estate:
>
> (a) To a benevolent, charitable, educational, literary, scientific, religious, or missionary institution, corporation, association, or purpose,
>
> (b) To this state, any other state or country, or a county, city, or town in this or any other state or country, or
>
> (c) To a person in trust for any such purpose or beneficiary, whether or not the trust appears on the face of the instrument making the devise,
>
> the devise shall be avoided in its entirety if one or more of the lineal descendants or a spouse who would receive any interest in the devise, if avoided, files written notice to this effect in the administration proceeding within 4 months after the date letters are issued, unless:
>
> (d) The will was duly executed at least 6 months before the testator's death, or
>
> (e) The testator made a valid charitable devise in substantially the same amount for the same purpose or to the same beneficiary, or to a person in trust for the same purpose or beneficiary, as was made in the last will or by a will or a series of wills duly executed immediately next to the last will, one of which was executed more than 6 months before the testator's death.
>
> (2) The testator's making of a codicil that does not substantially change a charitable devise as herein defined within the 6-month period before the testator's death shall not render the charitable gift voidable under this section.

[**5]

The circuit court ruled that Zrillic did have standing, but that section 732.803 was unconstitutional. Zrillic appealed the circuit court's decision as to the constitutionality of the statute, and the copersonal representatives of the Estate of Romans cross-appealed on the issue of standing.

The Fifth District Court of Appeal affirmed in part and reversed in part, finding that Zrillic had standing, but that section 732.803 did not violate either constitution. Both

Shriners Hospitals and the copersonal representatives of the Estate of Romans petitioned this Court to review that decision.

We are presented with two issues. The threshold question is whether a lineal descendant, whose legacy was expressly limited by the decedent's will, had standing to set aside a charitable devise in that will. The second question concerns the constitutionality of section 732.803.

II.

Zrillic had to satisfy two elements to meet the standing requirement of section 732.803. First, Zrillic had to be a lineal descendent of the testator. That fact was admitted. Second, Zrillic had to be eligible to receive an interest in the devise, if avoided. Copersonal representatives of the Estate of Romans argue that [**6] Zrillic would not have been able to take an interest if the charitable devise was avoided because the testator intended Zrillic not to share in the estate beyond the express terms of the will.

The general rule of construction is that the intent of the testator prevails. § 732.6005(1), Fla. Stat. (1985). However, allowing the testator's intent to control construction of section 732.803 would defeat both the plain meaning and the logic of the statute. See Ruppert v. Estate of Hastings, 311 So.2d 810, 811 (Fla. 1st DCA 1975)(construing predecessor statute). Section 732.803 would serve no purpose if Zrillic is denied standing because the statute's only logical use is to give standing to one who otherwise would be deprived of a legacy. Any other conclusion would have the practical effect of denying everybody the right to contest such a will. Clearly the legislature must have intended the general rule of construction in section 732.6005(1) to give way to the specific, contrary purpose of section 732.803. See, e.g., Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959)("It is a well settled rule of statutory construction . . . that a special statute [**7] covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms."). Thus, we agree with the district court that Zrillic had standing to petition to avoid the devise. We disapprove In re Estate of Herman to the extent that its reasoning conflicts with this analysis, but we find no conflict with Hooper v. Stokes and Milam v. Davis, which are wholly distinguishable.

Now we move on to discuss the constitutionality of section 732.803. First, we address whether the section imposes an unreasonable restriction on a property owner's right to dispose of property by will. Then we analyze the equal protection claim.

III.

Property rights are protected by *article I, section 2 of the Florida Constitution*:

> SECTION 2. Basic rights.--All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and *to acquire. possess and protect property: except that the ownership. inheritance, disposition and possession of real property by aliens ineligible for citizenship may be* [*67] *regulated* [**8] *or prohibited by law.* No person shall be deprived of any right because of race, religion or physical handicap.

(Emphasis added.)

These property rights are woven into the fabric of Florida history. See Declaration of Rights, §§ 1, 18, Fla. Const. (1885) (as amended prior to the 1968 revision); Declaration of Rights, §§ 1, 17, Fla. Const. (1868); art. I, § 1, Fla. Const. (1865); art. I, § 1, Fla. Const. (1861); art. I, § 1, Fla. Const. (1838).

To interpret the extent of property rights under the constitution, we must make a common sense reading of the plain and ordinary meaning of the language to carry out the intent of the framers as applied to the context of our times. See In re Advisory Opinion to the Governor Request of June 29, 1979, 374 So.2d 959, 964 (Fla. 1979). It is commonly understood that acquire means to gain, obtain, receive, or to come into possession or ownership of property, see, e.g., I The Oxford English Dictionary 115 (2d ed. 1989), and it "[i]ncludes taking by devise." Black's Law Dictionary 23 (5th ed. 1979) (emphasis supplied). Possess commonly means to have, hold, own, or control "anything which may be the [**9] subject of property, for one's own use and enjoyment, either as owner or as the proprietor of a qualified right in it." Id. at 1046-47; see also, e.g., XII The Oxford English Dictionary 171-72 (2d ed. 1989). Protect generally means to guard, preserve and keep safe from harm, encroachment, injury, alteration, damage, or loss. See, e.g., XII The Oxford English Dictionary 677-78 (2d ed. 1989); American Heritage Dictionary 995 (2d College ed. 1985). Thus, the phrase "acquire, possess and protect property" in article I, section 2, includes the incidents of property ownership: the "[c]ollection of rights to use and enjoy property, including [the] right to transmit it to others." Black's Law Dictionary 997 (5th ed. 1979) (emphasis supplied). 4

4 These same principles of property also are embodied in the *takings clauses of the constitutions of the United States* and the state of Florida, which require that property owners be compensated when the government substantially interferes with an owner's use of property. *E.g., First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987); Palm Beach County v. Tessler, 538 So.2d 846 (Fla. 1989).*

[**10]

This common sense reading of the language in article I, section 2, leads to the conclusion that the right to devise property is a property right protected by the Florida Constitution. Our conclusion is supported by the provision's express exception for aliens ineligible for citizenship. There would be no need to carve out an exception for "ownership, *inheritance*, *disposition* and possession of real property" unless those property rights already were subsumed in the clause modified by the exception. Furthermore, by narrowly limiting the class of persons whose rights may be restricted by the legislature, i.e., aliens ineligible for citizenship, it is clear that the framers intended all other people, including testators, be free from unreasonable legislative restraint.

We are aware that some decisions in Florida and elsewhere vary from this conclusion, relying upon an old legal distinction between "property" rights and "testamentary" rights. *See generally* 1 W. Bowe & D. Parker, *Page on the Law of Wills* chs. 1-3 (rev. ed. 1960). The distinction those courts have drawn is that property rights are inalienable rights grounded in natural law, whereas freedom of testation is [**11] purely a creation of

statute that did not exist at common law. The genesis of that distinction lies in long-abandoned feudal notions of property. In feudal England, only the king owned real property, which represented the bulk of wealth, and only the king could decide who could exercise real property rights when a person died. During the decline of feudalism, Parliament enacted the Statute of Wills to grant citizens the lawful right to devise real property, qualified by regulations necessary to preserve order. Hence, devising property came to be regarded as a right created by statute, not a "property" right inherent in the common law of England. *See generally* 1 W. Bowe & D. Parker, *Page on the Law of Wills* chs. 1-3 (rev. ed. [*68] 1960); 1 D. Redfearn, *Wills and Administration in Florida* chs. 1, 15 (L. Jeffries 6th ed. 1986); A. Reppy & L. Tompkins, *Historical and Statutory Background of the Law of Wills* ch. 1 (1928).

That analysis is inapplicable in our society where feudalism never existed and where property rights rest on an express constitutional foundation that is distinguishable from the common law roots of feudal England. Yet all too often courts have failed [**12] to thoroughly analyze the distinction, instead giving unquestioning allegiance to an antiquated way of thinking. *See Taylor v. Payne, 154 Fla. 359, 362-63, 17 So.2d 615, 617, appeal dismissed, 323 U.S. 666, 65 S. Ct. 49, 89 L. Ed. 541 (1944)*; *see also In re Estate of Greenberg, 390 So.2d 40, 43 (Fla. 1980)* (following *Taylor), appeal dismissed, 450 U.S. 961, 67 L. Ed. 2d 610, 101 S. Ct. 1475 (1981)*; *In re Estate of Blankenship, 122 So.2d 466, 469 (Fla. 1960)* (following *Taylor); Arthritis Foundation v. Beisse, 456 So.2d 954 (Fla. 4th DCA 1984)* (following *Taylor*), *review denied, 467 So.2d 999 (Fla. 1985)*. The plain meaning of the language of the Florida Constitution compels us to conclude that the people chose not to blindly adhere to the old English distinction, and instead came to regard testamentary disposition of property as a specifically expressed constitutional property right. *Accord In re Estate of Beale, 15 Wisc.2d 546, , 113 N.W. 2d 380, 383 (1962)* (the right to make a will [**13] is a constitutional right); *Nunnemacher v. State, 129 Wisc. 190, , 108 N.W. 627, 628 (1906)* (the right to pass property by will or inheritance is a natural right under the state constitution and cannot be wholly taken away or substantially impaired by the legislature).

Of course, even constitutionally protected property rights are not absolute, and "are held subject to the fair exercise of the power inherent in the State to promote the general welfare of the people through regulations that are reasonably necessary to, secure the health, safety, good order, [and] general welfare." *Golden v. McCarty, 337 So.2d 388, 390 (Fla. 1976)*; *see also Palm Beach Mobile Homes. Inc. v. Strong, 300 So.2d 881, 884 (1974)* (the degree of a constitutionally protected property right "must be determined in the light of social and economic conditions which prevail at a given time"); *cf. Department of Agric. & Consumer Servs. v. Mid-Florida Growers. Inc., 521 So.2d 101, 103 (Fla.)* (a property regulation may be reasonable but still may require the state to compensate a landowner), *cert. 488 U.S. 870, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988).* [**14]

The question we must resolve is whether section 732.803 is reasonably necessary to limit the property rights guaranteed by *article I, section 2 of the Florida Constitution.* We find that it is not. Statutes that restrict charitable gifts originated in feudal England as part of the struggle for power and wealth between the king and the organized church. *See generally, e.g.,* 1 D. Redfearn, *Wills and Administration in Florida* chs. 1, 15 (L. Jeffries

6th ed. 1986); *79 Am. Jur. 2d Wills § 176* (1975). The church acquired wealth through exercising its ecclesiastical jurisdiction over personal property, which was subject to much abuse, and its acquisition of real property by subinfeudation, which deprived the king and lords of some benefits and control over property disposition. *See generally* J. Dukeminer & J. Krier, *Property* 152-53 (2d ed. 1988); 1 D. Redfearn, *Wills and Administration in Florida* ch. 1 (L. Jeffries 6th ed. 1986); II F. Pollock & F. Maitland, *The History of English Law* ch. VI § 3 (2d ed. 1968). Mortmain statutes were promulgated primarily to restrict the church's ability to acquire property. However, mortmain statutes became less and less effective [**15] as feudalism declined. *See generally* J. Dukeminer & J. Krier, *Property* 152-53 (2d ed. 1988).

Over time, society's attitude has changed to the point where charitable gifts, devises and trusts now are favored and will be held valid whenever possible. *79 Am. Jur. 2d Wills § 176* (1975). *See also* 4A *Powell on Real Property* para. 577 (1986). As society's attitude changed, so did the rationale employed to support the few [*69] mortmain-type statutes that survived. [5] Today, they are justified by their supporters as a means of protecting a testator's family from disinheritance. The expressed concern is that charitable organizations either exert undue influence, or that testators who may be laboring under the apprehension of impending death are peculiarly susceptible to influence. *E.g., Taylor v. Payne, 154 Fla. 359, 364, 17 So.2d 615, 618, dismissed, 323 U.S. 666, 65 S. Ct. 49, 89 L. Ed. 541 (1944)*; 1 W. Bowe & D. Parker, *Page on the Law of Wills* § 3.15 (rev. ed. 1960).

5 The parties agree that only Florida, Georgia, Idaho and Mississippi have mortmain-type statutes still in effect. *Shriners' Hospital for Crippled Children v. Hester, 23 Ohio St. 3d 198, n.5, 492 N.E.2d 153, 157 n.5 (1986).*

[**16]

Although it may be reasonable for the legislature to protect family members who are dependent or in financial need, it is unreasonable to presume, as the statute seems to do, that all lineal descendents are dependents, in need, or are not otherwise provided for. Florida law is replete with protections for surviving family members who may have been dependent on the testator. For example, the Florida Constitution expressly provides protection in the form of homestead exemptions for real and personal property, art. X, § 4, Fla. Const.; see also §§ 732.401-.4015, Fla. Stat. (1985), and a coverture restriction, art. X, § 5, Fla. Const.; see also § 732.111, Fla. Stat. (1985). The Probate Code provides for an elective share, §§ 732.201-.215, Fla. Stat. (1985), personal property exemptions, § 732.402, Fla. Stat. (1985), and a family allowance, § 732.403, Fla. Stat. (1985). The Probate Code also protects against fraud, duress, mistake, and undue influence. § 732.5165, Fla. Stat. (1985).

No similar protections are assured by section 732.803. To the contrary, the charitable devise restriction fails to protect against windfalls for lineal descendents who have had no contact with the [**17] decedent or who have been neglectful or abusive to the decedent but who may benefit from the avoidance of a charitable devise. It also fails to protect against windfalls for lineal descendents whose legacy was specifically limited by the decedent. Another significant flaw is that artful will drafting easily defeats the effect of the statute: If the testator names anybody other than a spouse or lineal descendent to take

the charitable devise in the event the charitable devise fails, nobody would have standing to petition to avoid the charitable devise. See In re Estate of Shameia, 257 So.2d 77, 78-79 (Fla. 2d DCA 1972).

Neither the ancient purpose nor the modern justification underlying the restriction on charitable devises is well served by section 732.803. The statute is not reasonably necessary to accomplish the asserted state goals at the cost of offending property interests protected by the Florida Constitution.

IV.

We also find that section 732.803 violates the equal protection guarantees of article I, section 2 of the Florida Constitution, and the fourteenth amendment of the United States Constitution.

It is well settled under federal and Florida law [**18] that all similarly situated persons are equal before the law. McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964); McLaughlin v. State, 396 So.2d 707 (Fla. 1981); Soverino v. State, 356 So.2d 269 (Fla. 1978). Moreover, without exception, all statutory classifications that treat one person or group differently than others must appear to be based at a minimum on a rational distinction having a just and reasonable relation to a legitimate state objective. In re Greenberg's Estate, 390 So.2d 40 (Fla. 1980), appeal dismissed sub nom Pincus v. Estate of Greenberg, 450 U.S. 961, 101 S. Ct. 1475, 67 L. Ed. 2d 610 (1981); Graham v. Ramani, 383 So.2d 634 (Fla. 1980); Department of Health & Rehabilitative Services v. Heffler, 382 So.2d 301 (Fla 1980).

Palm Harbor Special Fire Control Dist. v. Kelly, 516 So.2d 249, 251 (Fla. 1987). Equal protection analysis requires that classifications be neither too narrow nor [*70] too broad to achieve the desired end. Such [**19] underinclusive or overinclusive classifications fail to meet even the minimal standards of the rational basis test quoted above. [6]

> 6 We have previously applied the rational basis test in the context of a probate dispute where neither a suspect class nor a fundamental right was implicated. *See In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980), appeal dismissed, 450 U.S. 961, 101 S. Ct. 1475, 67 L. Ed. 2d 610 (1981)* (a testator has no fundamental right to appoint a personal representative). Although the express constitutional property right at issue in the instant case may well qualify for application of a more stringent test, we need not address that issue because the charitable devise restriction in section 732.803 fails to satisfy even the rational basis test.

Section 732.803 creates a class consisting of only those testators who die within six months after executing a will that devised property to a "benevolent, charitable, educational, literary, [**20] scientific, religious, or missionary institution, corporation, association, or purpose," a governmental body, or a trustee thereof. This classification is underinclusive because "it does not affect many charitable gifts made without proper deliberation, nor does it void legacies to persons who are in an equal position with

religious persons to influence a testator." *Estate of French, 365 A.2d 621, 624 (D.C. 1976), appeal dismissed, 434 U.S. 59, 98 S. Ct. 280, 54 L. Ed. 2d 238 (1977).* The statute does not protect against overreaching by unscrupulous lawyers, doctors, nurses, housekeepers, companions, or others with a greater opportunity to influence a testator. There is no reason to believe that testators need more protection against charities than against unscrupulous and greedy relatives, friends, or acquaintances. [7]

7 "Modern policies . . . . do not seem to suggest that testators need more protection against charities than against greedy relatives." ABA Real Property, Probate and Trust Law Section, Committee on Succession, *Restrictions on Charitable Testimentary Gifts*, 5 Real Prop., Prob. and Trust J. 290, 298 (1970) (quoted in Note, *Pennsylvania's Mortmain Statute Declared Unconstitutional*, 80 Dick. L. Rev. 152, 153 (1975) (emphasis omitted)).

[**21]

The classification also is overinclusive because "it voids many intentional bequests by testators who were not impermissibly influenced or who do not have immediate family members in need of protection." Estate of French, 365 A.2d at 624. Estate of Cavill, 459 Pa. 411, 416, 329 A.2d 503, 506 (1974). As our sister court in Ohio said of its analogous statute:

Unfortunately, a large number of cases falling within the scope of R.C. 2107.06 involve the estates of testators who did not execute their last will under the belief that their death was near. Furthermore, out of the remaining cases impacted by the statute in which the testator did believe that he was near death, it is reasonable to assume that few involved bequests that were based upon unsound judgment or the result of undue influence by a governmental, benevolent, religious, educational or charitable beneficiary.

Shriners' Hosp. for Crippled Children v. Hester, 23 Ohio St. 3d 198, , 492 N.E.2d 153, 156 (1986) (emphasis in original).

There is no rational distinction to automatically void a devise upon request when the [**22] testator survives the execution of the will by five months and twenty-eight days, but not when the testator survives a few days longer. Accord In re Estate of Cavill, 459 Pa. at , 329 A.2d at 505-06. Nor is it rational to apply the statute in cases where the testator dies suddenly due to an accident during the six-month period after making the charitable bequest.

The effect of section 732.803 is to defeat the testator's express intent without any reasonable relation to the evil sought to be cured. We agree with the analogous decisions of our sister courts in Hester, Estate of French, and In re Estate of Cavill. The classification established in section 732.803 does not draw a rational distinction, and it is neither just nor reasonably related to a legitimate governmental purpose. 8

8 Certainly the statute would fail to pass constitutional muster under a heightened scrutiny analysis as well. *See supra* n.6.

For the aforementioned reasons, we overrule *Taylor*, approve the decision of the court below [**23] as to standing, but quash the decision as to its discussion of the [*71] constitutionality of section 732.803. We find that section 732.803 is unconstitutional for the reasons expressed above. This cause is remanded for further proceedings in accordance herewith.

It is so ordered.

**CONCUR BY:** GRIMES

**CONCUR**

GRIMES, J., concurring in result.

I agree that section 732.803, Florida Statutes (1985), violates the equal protection clauses of the state and federal constitutions. Therefore, I concur with sections I, II, and IV of the majority opinion.

I cannot agree with section III of the majority opinion which holds that *article I, section 2, of the Florida Constitution* contains a constitutional right to devise property which renders invalid the provisions of section 732.803. In *Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615,* It So.2d 615, *appeal dismissed, 323 U.S. 666, 65 S. Ct. 49, 89 L. Ed. 541 (1944),* this Court held that similar language in our earlier constitution did not preclude the legislature from enacting section 732.803. Nothing has occurred since that date to suggest that this analysis was wrong. I concur with Justice [**24] McDonald's discussion of this issue.

**DISSENT BY:** McDONALD

**DISSENT**

McDONALD, J., concurring in result, dissenting in part.

I concur with the result reached in the majority opinion, but for entirely different reasons. For the reasons hereinafter stated, I would sustain the constitutionality of section 752.803, Florida Statutes (1985), but, because the testatrix clearly and unequivocally expressed the intent to drastically restrict and limit her bequests to her daughter and because the will demonstrates other lineal descendants, I would rule that Mrs. Zrillic cannot contest the charitable bequest. Because of the clear intent manifested in the will to limit her inheritance she is not a lineal descendant who would receive any interest in the devise and does not meet the qualification required by the statute to complain. Such a holding is consistent with *In re Estate of Cairo, 35 A.D. 2d 76, 312 N.Y.S.2d 925 (1970), affirmed, 29 N.Y.2d 527, 272 N.E.2d 574, 324 N.Y.S.2d 81 (1971).* It may be inconsistent with *Ruppert v. Estate of Hastings, 311 So.2d 810 (Fla. 1st DCA 1975),* but the facts of that reported case are [**25] too limited to tell.

To the extent possible we should give meaning to sub *section 732.6005(1), Florida Statutes* (1985), which provides: "The intention of the testator as expressed in his will

controls the legal effect of his dispositions. The rules of construction expressed in this part shall apply unless a contrary intention is indicated by the will." Such intention must yield to a statutory or constitutional inhibition, but otherwise should be followed. It is clear that the testatrix did not want Mrs. Zrillic to receive more than a specified and limited bequest. Under these circumstances other lineal decendants would be the residual legatees who would receive any voided bequests, not Mrs. Zrillic. If the complaining party would receive no interest in the voided estate, a court should not void it. *In Re: Estate of Herman, 427 So.2d 195 (Fla. 4th DCA 1982)*. I conclude that only the grandchildren could complain of the bequest to Shriners and, because they did not do so, the bequest survives.

I would adhere to the holding of *Taylor v. Payne, 154 Fla. 359, 17 So.2d 615, dismissed, 323 U.S. 666, 65 S. Ct. 49, 89 L. Ed. 541 (1944)*, [**26] and sustain the constitutionality of section 732.803, Florida Statutes (1985). In *Taylor* this Court rejected the contention that the then-existing section 20 of the Probate Act, the pertinent portions of which are now codified in section 732.803, Florida Statutes (1985), was unconstitutional "in that it deprives the testator and the legatees of the right to receive, enjoy and dispose of property without due process of law, and denies them the equal protection of the law in the acquisition [*72] and disposition of property." *Id. at 362, 17 So.2d at 617*. In doing so it stated:

Nowhere in the Federal Constitution is there any attempt to treat of the matter of disposition of property by will, no reference being made to the subject of testamentary alienation of property, either directly or by implication. And except as the power to will property has been limited indirectly by Article X of the Constitution of Florida, which inhibits the alienation of homestead property by will where the owner thereof has children in esse, no effort at constitutional regulation of the subject has been made by the people of the State of Florida. Therefore, the [**27] right of testamentary disposition of property does not emanate from the organic law, as contended by counsel, but is a creature of the law derived solely from statute without constitutional limitation. Accordingly, the right is at all times subject to regulation and control by the legislative authority which creates it. The authority which confers the right may impose conditions thereon, such as limiting disposition to a particular class or fixing the time which must ensue subsequent to the execution of the will before gifts to a particular class shall be deemed valid; or the right to dispose of property by will may be taken away altogether, if deemed necessary, without private or constitutional rights of the citizen being thereby violated.

*Id. at 362-63, 17 So.2d at 617*. It further noted:

> Our statute is not a mortmain act. The Legislature never intended by the enactment of the statute to place any restriction upon the right of benevolent, charitable, educational, or religious institutions to take and hold property; but only to place a limitation upon the right of testators to dispose of their property to such institutions when the conditions [**28] that are detailed in the statute exist. The purpose of the statute is clear: it is to protect the widow and children from improvident gifts made to their neglect by the testator; the design of the statute being obviously to prevent testators who may be

> laboring under the apprehension of impending death from disposing of their estates to the exclusion of those who are, or should be, the natural objects of the testator's bounty.
>
> *Whether the legislative philosophy behind such enactment is sound may be debatable. But the power of the legislature to enact such a statute may not be doubted.*

*Id. at 364, 17 So.2d at 618* (citations omitted, emphasis added).

I confess that the facts of this case are not attractive for application of the statute, but could well be present in another series of events. Surely one would have to say that, had the testator, in her last few days, succumbed to a television evangelist's call to be with the Lord by delivering her property to his church and thus leave unprotected a physically handicapped child, a rational basis for the statute would exist. The legislature has the right to put conditions on devises of [**29] property. It may be that in today's society the legislature *should* not effect legislation like section 782.803, but that is for it to decide. Our role is to decide whether the legislature *should* do so and, contrary to the majority's views, I believe it can.

The majority concludes that disposition of property by will is protected by article I, section 2, Florida Constitution, and implicitly restricts the legislature's power to act in this area. This is in conflict with Taylor and In re Estate of Blankenship, 122 So.2d 466, 469 (Fla. 1960), in which this Court stated that "the right to dispose of property by will is neither inherent nor is it protected by our state or federal constitutions. The right is a creature of statute, subject at all times to prohibition, regulation, and control by the legislature."

The right of the legislature to control and put limitations on the devise of property has long been recognized. Justice Taylor's concurring opinion in Thomas v. Williamson, 51 Fla. 332, 342-43, 40 So. 831, 834 (1906), correctly stated:

The power to alienate any species of property by last will and testament has [**30] never been an inherent right in the citizen, [*73] but one that is derived from legislation, and is at all times subject to legislative control, and may at any time be altogether taken away by legislative act. In the history of this State, as early as November 20th, 1828, every person of the age of twenty-one years was empowered, by an act of the legislature then passed to dispose of property real and personal by last will and testament, and thus has the law stood from that day down to the present time. Section 1792, Revised Statutes of 1892. I do not think that it was the design of Section 4 of Article X of our Constitution of 1885 to curtail or impose any limitations or restrictions upon the power of the legislature over the general subject of the alienation of property by last will and testament, except that it in express terms makes the homestead inalienable by will when the holder thereof has children in esse. Of course the legislature cannot interfere with this status given by the organic law to the homestead of a holder having children. The constitution inhibits its alienation by will when the holder has children, and the legislature is without power contra to the [**31] constitution, to empower him to do so; but the language of said section 4 of the constitution is carefully and somewhat peculiarly chosen. It expressly and carefully confines any one construing it to its own terms and

provisions. Its language is: "Nothing LA this article shall be construed to prevent the holder of a homestead, if he be without children, from disposing of his or her homestead by will in a manner prescribed by law." This is equivalent to saying: "None of the provisions in this article of this constitution shall be held to prevent the holder of a homestead who is without children from alienating the same by will, but although this constitution does not so prevent, yet the legislature is left free to prevent it, or to impose such limitations and conditions upon such an alienation of it, in the absence of children, as it may see proper." In other words, the constitution neither permits nor prevents the disposal of the homestead by will, when the holder is without children, but the legislature is left free to deal with the subject as it sees proper.

(Emphasis in original.)

Taylor was decided in 1944. I do not know of any constitutional [**32] or societal changes since then adequate to mandate overruling it. As recently as 1984 the statute's constitutionality was upheld by the Fourth District Court of Appeal in Arthritis Foundation v. Beisse, 456 So.2d 954 (Fla. 4th DCA 1984), review denied, 467 So.2d 999 (Fla. 1985). Prior thereto the legitimacy of the statute had been recognized numerous times. E.g., Ruppert v. Estate of Hastings, 311 So.2d 810 (Fla. 1st DCA 1975); In re Estate of Rauf, 213 So.2d 31 (Fla. 1st DCA 1968), cert. denied, 225 So.2d 524 (Fla. 1969); In re Estate of Lane, 186 So.2d 257 (Fla. 2d DCA 1966); In re Estate of Blankenship. The legislature has not repealed the statute since we found it constitutional, but has, in effect, reenacted it. We should not nullify it now. I therefore dissent on finding section 732.803 unconstitutional.

West's Annotated Indiana Code
Title 29. Probate
Article 1. Probate Code (Refs & Annos)
Chapter 13. Collection and Management of Assets

**29-1-13-1.1 Electronically stored documents or information; custodians; providing access or copies to personal representative of estate**

Sec. 1.1.

(a) As used in this section, "custodian" means any person who electronically stores the documents or information of another person.

(b) A custodian shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of any documents or information of the deceased person stored electronically by the custodian upon receipt by the custodian of:

(1) a written request for access or copies made by the personal representative, accompanied by a copy of the death certificate and a certified copy of the personal representative's letters testamentary; or

(2) an order of a court having probate jurisdiction of the deceased person's estate.

(c) A custodian may not destroy or dispose of the electronically stored documents or information of the deceased person for two (2) years after the custodian receives a request or order under subsection (b).

(d) Nothing in this section shal1 be construed to require a custodian to disclose any information:

(1) in violation of any applicable federal law; or

(2) to which the deceased person would not have been permitted access in the ordinary course of business by the custodian.

**Credit(s)**

As added by P.L.12-2007, SEC.1.

I.C. 29-1-13-1.1, **IN ST 29-1-13-1.1**

Current through end of 2007 1st Regular Session.