

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 298

SPONSOR: Senators Geller and Campbell

SUBJECT: Elective Share

DATE: March 19, 1999

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The bill revises a substantial portion of the Elective Share Law in Part II of chapter 732, F.S. The bill sets forth the following major provisions:

- ▶ Clarifies that a spouse has a right to claim an elective share of the “elective estate.”
- ▶ Enumerates the probatable and nonprobatable property assets, including any inter vivos trust, that will constitute a part of the elective estate for purposes of determining the elective share.
- ▶ Excludes certain property assets, including assets in a qualifying special needs trust for an incapacitated spouse, from the elective estate.
- ▶ Revises existing fair market valuation of elective share property to provide for different valuation of elective estate property based on the type of property, and fair market valuation for all other unspecified property.
- ▶ Introduces valuation dates on which different properties are to be valued.
- ▶ Establishes the elective share amount to be a flat 30% of the elective estate.
- ▶ Revises the priority scheme of recipients and beneficiaries of the elective estate into a 3-tiered priority scheme and expands the sources from which to satisfy the elective share.
- ▶ Imposes liability on direct recipients and beneficiaries for the value of the estate or property, or for the actual estate or probate property sold or otherwise transferred prior to the distribution or contribution toward satisfying the elective share.
- ▶ Provides a mechanism for extension of time to file and withdraw an election to an elective share.
- ▶ Imposes a duty on the personal representative of the decedent to collect contributions from the recipients to satisfy the elective share.
- ▶ Revises the statute of limitations period to extend the time for filing notice to exercise an elective share from the existing 4 months to the earlier of either within 6 months of the first publication of the notice of administration or within 2 years of the date of the decedent’s death.

- ▶ Provides that the rights of spouses established under chapter 61, F.S., relating to dissolution of marriage, are unaffected by this bill.
- ▶ Provides for effective date and specifically exclude the application of the law to irrevocable contracts entered into before October 1, 1999.

This bill substantially amends the following sections of the Florida Statutes: 732.201, 732.205, 732.206, 732.207, 732.208, 732.209, 732.210, 732.211. The bill also creates the following sections: 732.2035 and 732.2045.

II. Present Situation:

A. *Current Florida Law: Elective Share Statutes*

Part II of Chapter 732, F.S., relating to a surviving spouse's elective share under the probate code. An elective share refers to the right of a surviving spouse to a dollar amount, not to any specific property, of the estate property of the deceased spouse. A surviving spouse may file for an elective share of a deceased spouse's estate within four months from the date of the first publication of notice of the administration. *See* §732.210, F.S. If a proceeding occurs involving the construction, admission or validity of the estate, then the time to file an election is tolled 40 days from the date of termination of all the proceedings. *See* §732.212, F.S.

A surviving spouse may also waive, in part or in full, before or after marriage, the right to an elective share, through the execution of a written agreement. *See* §732.702, F.S. However, if the waiver agreement is executed after marriage, each spouse must make a fair disclosure of his or her estate. *See* §732.211, F.S. There is no such disclosure requirement if the waiver agreement is signed before marriage. *Id.*

Once the petition for the elective share is filed by the surviving spouse or the guardian of the property on behalf of the surviving spouse, the court must make the determination of the amount of the elective share. *See* §732.214, F.S. The court can order payment either in cash or in kind from the assets of the estate. If a federal estate tax liability issue is outstanding, the court may suspend the distribution of the elective share upon notice by any interested party until there is final settlement of the matter. If the right of election for the elective share affects a death tax, the surviving spouse's elective share must bear the additional tax. *See* §732.215, F.S.

The amount of the elective share is determined by calculating 30% of the fair market value of all of the deceased spouse's property that is subject to probate administration minus all valid claims against the estate and all mortgages, liens or security interests. *See* §732.207, F.S. The property of the surviving spouse is not taken into account in determining the elective share.

All of a decedent's property is subject to probate administration, with the exception of real property not located in Florida. *See* §732.206, F.S. However, there are certain property assets that are considered nonprobate assets for purposes of calculating an elective share, including

assets held in a revocable inter vivos trust.¹ See *Friedberg v. Sunbank/Miami, N.A.*, 648 So.2d 204 (Fla. 3d DCA 1995). The Florida courts have ruled that even if the creation of the trust was made with the specific intent to circumvent a surviving spouse's elective share, assets in an inter vivos trust are not subject to probate estate administration. See *Traub v. Zlatkiss*, 359 So.2d 443 (Fla. 5th DCA 1990). The omission of nonprobate transferred property assets from the elective share is one of several criticisms of the current elective share law.² The Florida courts have acknowledged that the consequence of excluding assets in revocable inter vivos trusts from the elective share computation is unfair to the surviving spouse and constitutes poor public policy. *Friedberg* at 206. The courts, however, have ceded to the legislature to address the matter. The Florida Legislature has not enacted any legislation to date.

An elective share is payable first from assets passing under a will. See §732.209, F.S. If these assets are insufficient to satisfy the elective share, then certain property assets are appropriated to satisfy the elective share in the order prescribed in s. 733.805, F.S.: (1) property not disposed of by will, (2) property willed (and remaining) to a residuary devisee, (3) property not specifically willed, and (4) property specifically willed). The elective share is exclusive of exempt property such as homestead, furnishings, automobiles in the decedent's name, and family allowances. See §§ 732.20 and 732.401-03, F.S. Once the elective share is satisfied, the remaining assets of the estate are distributed as though the surviving spouse had predeceased the decedent. See §732.211, F.S.

B. Other State Law or Approaches Governing Surviving Spouse's Estate Share³

- *Augmented Estate*

Most states have adopted the “augmented estate” approach. Under this approach, the elective share is based on a certain minimum percentage of a deceased spouse's assets, including probate and nonprobate assets over which the decedent retained substantial control.⁴ This broader concept

¹An inter vivos trust is an estate planning tool that: 1) is initially funded by an inter vivos transfer, 2) names a trustee to hold legal title and manage settlor's property, 3) benefits the settlor during the settlor's life, 4) provides for final distributions after a settlor's death, and 5) reserves to the settlor the right to amend or revoke the trust.

²Other criticisms have included that the elective share law allows a surviving spouse to destroy a decedent's otherwise sound estate plan or that a surviving spouse is not given consideration for the duration of the marriage. For example, under Florida's divorce law, a spouse has a right to an equitable percentage of all assets accumulated during a marriage, including assets held in a revocable inter vivos trust or a joint bank account. See § 61.075, F.S.; *Carrison v. Carrison*, 486 So.2d 1363 (Fla. 1st DCA 1986). Additionally, the courts consider a number of factors in making any adjustment to the initial 50% equitable distribution, including the duration of the marriage, the parties' economic circumstances, contribution to each other's education or professional career, and any other factors to do “equity and justice between the parties.” *Id.* Consequently, a spouse could receive a greater share of the marital assets after a divorce than after the death of a spouse.

³Abraham M. Mora and Sanford J. Schlesinger, *Reforming Florida's Elective Share Law: Is the Cure Worse Than the Disease?* The Fla. Bar J., December 1998 at 46.

⁴The state of New York has adopted an augmented estate law for purposes of determining a surviving spouse's estate share. The surviving spouse has a right to share in the greater of \$50,000 or one-third of the net estate (which is defined as the decedent's elective share estate after deductions for debts, administration expenses, and reasonable funeral expenses). The decedent's “elective share estate” includes property passing under the will or passing by intestate succession, plus various testamentary substitutes. Testamentary substitutes include certain gratuitous transfers of property, certain dispositions of property and

allows the surviving spouse to use an inter vivos trust to satisfy his or her elective share and prevents one spouse from disinheritting the other since the surviving spouse is given the right to claim an elective share over the assets in which the decedent retained control. No adjustments are made if the marriage was short-term or long-term, or if the surviving spouse received assets during the marriage, but is not in need of support.

- *Accrual Method*

A few states have adopted the “accrual method approach” which was adopted into the Uniform Probate Code in 1990. *See* §2-202 of the Uniform Probate Code. Under this approach, the elective share is based on a sliding percentage scale using criteria similar to the criteria used in determining the distribution of assets in the event of a divorce (e.g., duration of marriage). The spouse’s elective share right accrues at the rate of 3% per year of the combined assets of both spouses, for the first eleven years of marriage (or until the elective share reaches 33% in the eleventh year). Thereafter the spouse’s right to an elective share accrues at 4% per year of the combined assets of both spouses, until the elective share reaches 50%. In essence, this approach takes into consideration not only the length of marriage, but the economic contributions made by the parties. This approach assumes that both spouses will be forthcoming in full disclosure of their assets.

- *Community Property*

As another alternative, some states have tried to avoid some of the complexities of an elective share approach entirely by using the “community property” approach. Under this methodology, the spouse is automatically entitled to 50% of the marital estate which is deemed “community property” regardless in whose name it is titled and regardless of the duration of the marriage. Under the “community property” approach, there are three classifications of property: quasi-community property, community property and separate property.⁵

Some concerns raised with the “community property” involve the difficulties associated with commingling of assets, tracing asset ownership, restricting testamentary freedom, titling and valuing property, and creating inequities between spouses of short-term versus long-term marriages.

contractual arrangements; property payable under a thrift, savings retirement, or pension; a Totten trust bank savings accounts; and certain joint bank accounts; and property held in joint tenancy with right of survivorship, or as tenants by the entirety.

⁵“Quasi-community property” is property that was acquired while the spouses lived in a common law state and then brought the property into a community property state. Some states treat this property as community property for both probate and divorce, others treat it as community property for either probate or divorce, but not both. “Community property” is property acquired by a spouse during marriage, except for property acquired as a gift, through a devise or by descent. Included in this definition is any and all compensation and income earned or generated during the marriage. “Separate property” is property acquired prior to marriage or acquired during the marriage by devise, gift or descent.

III. Effect of Proposed Changes:

Overall, the bill amends a substantial part of Part II of chapter 732, F.S. (ss. 732.201-.278, F.S.) which sets forth the elective share law. The cumulative effects of the bill are to establish a comprehensive mechanism for identifying and computing property assets, including assets transferred to a revocable trust fund, in an elective share estate. Due to the complexity of the bill, the following discussion incorporates a brief restatement of the current law and the effects of the proposed changes in a section-by-section analysis.

Section 1. Right to elective share

Current Law

A surviving spouse has the right to a share of a deceased spouse's estate property subject to administration. *See* § 732.201, F.S.

Effect of Proposed Changes

Section 732.201, F.S., is amended to provide technical changes reflecting new terms in the bill but restates that a surviving spouse has a right to a share of the decedent's "elective estate." The existing statutory term "deceased spouse" is replaced with the term "decedent"

Section 2. Definitions

Current Law

Part II of chapter 732, governing the elective share law contains no section for definitions.

Effect of Proposed Changes

Section 732.2025, F.S., is created to provide definitions for the following terms: "direct recipient," "elective share trust," "general power of appointment," "governing instrument," "payor," "person," "probate estate," "qualifying special needs trust or supplemental needs trust," "revocable trust," "transfer in satisfaction of elective share," and "transfer tax value."

Specifically, "elective share trust" is defined as a trust: a) under which the surviving spouse is entitled to the use of the property or to all the income payable at least annually, b) that is subject to the provisions of s. 738.12, F.S., relating to underproductive property; or under which the surviving spouse has the right to make the property productive or convert it within a reasonable amount of time, and c) under which no person other than the spouse has the power to distribute income or principal to any one other than the spouse.⁶

⁶Currently, s. 738.12, F.S., provides that a trustee is required to pay to the income beneficiary an amount equal to the excess of 3 percent on a trust fund's principal value when the principal does not yield annually a minimum 3% of its market value.

It also defines "transfer in satisfaction of the elective share" as an irrevocable transfer by the decedent to an elective share trust. Lastly, this section defines "qualifying special needs trust or supplemental needs trust" as a trust established for an ill or disabled surviving spouse, with the court's approval either before or after the decedent's death provided that upon the decedent's death the income and principal are distributable to the benefit of the incapacitated surviving spouse for life, in the discretion of one or more trustees (less than half of whom are ineligible family trustees),⁷ and no other person than the spouse has the power to distribute the income or principal to anyone else during the spouse's life. An exception to the court approval and the limitation on ineligible family trustees is created for trust property valued at less than \$100,000.

Section 3. Property entering the elective estate

Current Law

With the exception of non-Florida real property, all of a decedent's property wherever located is subject to probate administration, provided the decedent was domiciled in Florida. *See* §§ 732.205 and 732.206, F.S.

Effect of Proposed Changes

Section 732.2035, F.S., is created to state that the elective estate shall consist of the sum value of 9 major categories of property interests, but subject to the exclusions and overlaps set forth in the newly created s. 732.2045, F.S.:

- 1) Probate estate
- 2) Joint bank accounts, registered securities and other similar arrangements (e.g., "Pay On Death", "Transfer On Death", "In Trust For" or co-ownership with right of survivorship form).
- 3) Joint tenancies and tenancy by entireties (i.e., the decedent's fractional interest in property held in joint tenancy with the right of survivorship or in tenancy by the entirety, with certain exceptions).
- 4) Revocable trusts (i.e., property transferred by the decedent provided the transfer could be revoked either by the decedent or in conjunction with another person)
- 5) Irrevocable transfers by and for the decedent
 - Transfers with retained right to income or principal: the decedent possessed the right to, or enjoyed the possession or use of, the income or principal of the property; or
 - Discretionary trusts for decedent: The principal of the property could be distributed or appointed to for the benefit of the decedent by any person other than the decedent's spouse. In the application of this subsection, a right to payments from an annuity or under a similar contractual arrangement shall be treated as a right to that portion of the income of the property necessary to equal the annuity or other contractual payment.

⁷ The decedent's grandparents and any descendants of the decedent's grandparents (who are not descendants of the surviving spouse) are ineligible family trustees.

However, this category of property does not apply if property interest in which the decedent did not have exclusive control or autonomous right to receive benefits from or entitlement to the actual property. More specifically, this section does apply to property interest as follows;

- The property could not be distributed to or for the benefit of the decedent without the consent of all persons having an interest in the property;
 - The income or principal of the property could not be distributed except through the exercise or in default of an exercise of a general power of appointment;
 - The income or principal of the property is or could be distributed in satisfaction of the decedent's obligation of support; or
 - The decedent had a contingent right to receive principal which contingency was beyond the control of the decedent and which had not in fact occurred at the decedent's death.
- 6) Life insurance (i.e., the decedent's beneficial interest in the surrender value of the decedent's life insurance policy immediately before death).
 - 7) Retirement plans (i.e., the value of amounts payable under any public or private pension, retirement, or deferred compensation plan, or any similar arrangement, other than benefits payable under the federal Railroad Retirement Act or the federal Social Security System. The elective estate will not include the excess of proceeds on a decedent's life insurance policy under a defined contribution plan as defined in s. 414(i) of the IRS Code of 1986, as amended.
 - 8) 'Near death transfers' (i.e., certain property that was transferred during the 1-year period preceding the decedent's death).
 - 9) Transfers in satisfaction of the elective share

Section 4. Exclusions and overlapping application

Current Law

The elective share is exclusive of exempt property such as homestead, furnishings, appliances up to \$10,000, automobiles in the decedent's name, Florida Prepaid College Program and family allowances. *See* §§ 732.20 and 732.401-03, F.S.; *See* also §4, Art. X, Fla. Const. In addition, provides that the elective share is in addition to certain other properties and allowances. *See* § 732.208, F.S. The current law does not address other exclusions and/or overlapping applications.

Effect of Proposed Changes

Section 732.2045, F.S., is created to provide for exclusions and overlapping applications. Specifically, subsection (1) excludes the following properties from the elective estate:

- a) Any irrevocable transfer of property made by the decedent before the effective date of this subsection, or after the effective date of this subsection if it precedes the date of the decedent's marriage to the surviving spouse.

- b) Any transfer of property for which the decedent received adequate consideration in money or money's worth⁸ in exchange.
- c) Any transfer of property made by the decedent with written consent of the decedent's spouse (However, spousal consent to split-gift treatment under the U.S. gift tax laws does not constitute written consent to the transfer by the decedent).
- d) The proceeds in excess of the net cash value of any life insurance policies on the decedent's life.
- e) Any court-ordered insurance policy maintained on the decedent's life.
- f) One-half of the decedent's community property under the provisions of the Florida Uniform Disposition of Community Property Rights at Death Act. (See §§732.216-732.228, F.S.)
- g) Any property held in a qualifying special needs trust on the date of the decedent's death.
- h) Property in which the decedent's only interest was the power of appointment for the benefit of persons other than the decedent.

Subsection (2) provides for overlapping application regarding property duplicated in the elective estate under s. 732.2035, F.S. It states that if the same property is addressed by subsection (1) of s. 732.2035 and any other subsection, then the elective estate amount is reduced by the amount included under subsection (1) of s. 732.2035. If the same property interest arises under more than one subsection other than subsection (1) of s. 732.2035, then the elective estate amount shall be based on the subsection that results in the largest elective estate.

Section 5. Valuation of the elective estate

Current Law

The valuation of an elective share is set at 30% of the fair market value of all of the decedent's property subject to administration under the elective share law on the date of the decedent's death and after deductions have been made for all claims against the estate paid or payable from the estate, and all mortgages, liens or security interests. *See* §. 732.207, F.S.

⁸ The phrase "in money or money's worth" is referenced in the Internal Revenue Code §2512, Valuation of Gifts, which states: "(b) Where property is transferred for less than an adequate and full consideration *in money or money's worth*, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of the gifts made during the calendar year." IRC, 26 USCS §2512 (1998) (emphasis supplied). *See also* 26 USCS §§2031 & 2053.

Effect of Proposed Changes

Section 732.205, F.S., is substantially reworded to eliminate provisions prohibiting the right of an elective share in a decedent's Florida property when the decedent was not domiciled in Florida.

Instead, this section now provides for the new valuation of an elective share. It provides a definition for the term "value" as applied to certain properties includable in the elective estate under the newly created s.732.2035, F.S. In addition, this section retains some existing statutory language [currently found in s. 732.207, F.S., with a slight modification) regarding valuation of all other nonspecified property. Such property valuation shall be based on the fair market value of the property after deductions have been made for all claims, other than funeral expenses, paid or payable from the elective estate and all mortgages, lien or security interests on the property.

Section 6. Elective share amount*Current Law*

As stated earlier, the amount of the elective share under current law consists of a fixed 30% of the fair market value of all of the decedent's property subject to administration, with the exception of real property not located in Florida and after deductions have been made for certain claims against the estate, and mortgages, liens and security interests. *See* §732.207, F.S. No percentage distribution adjustment is made for factors such as the number of years of marriage or the parties' economic circumstances.

Effect of Proposed Changes

Section 732.206, F.S., is substantially reworded to eliminate provisions relating to the property entered into computation.⁹ Instead, this section now states that the amount of the elective share shall be equal to 30% of the elective estate.

Section 7. Sources from which elective share payable*Current Law*

An elective share is payable first from assets passing under a will. *See* §732.209, F.S. If the assets are insufficient to satisfy the elective share, then certain property assets are appropriated towards the unsatisfied balance of the elective share in the order prescribed in s. 733.805, F.S.: 1) property not disposed of by will, 2) property willed (and remaining) to a residuary devisee, 3) property not specifically willed, and 4) property specifically willed.

Effect of Proposed Changes

Section 732.207, F.S., is substantially reworded to eliminate existing provisions relating to the

⁹This subject matter was relocated to the newly created s. 732.2035, F.S., relating to property entering into elective estate.

amount of the elective share.¹⁰ Instead, this section provides for a new 3-tiered priority scheme of sources from which to satisfy an elective share. Specifically, subsection (1) provides that property passing to or for the benefit of the surviving spouse through the decedent's will or in a trust referenced in a will is first applied to satisfy the elective share. Thereafter, the following are applied, in the order prescribed, to satisfy the elective share:

- The decedent's life insurance policy proceeds to the benefit of the surviving spouse, provided the policy was owned by someone other than the surviving spouse at the time of the decedent's death;
- Amounts to the benefit of the surviving spouse payable under any pension, retirement or compensation plan;
- One-half of any property described in the exclusions and overlapping applications (s. 732.2045, F.S., herein) paid to or for the benefit of the surviving spouse;
- Property held in a qualifying special needs trust for the benefit of a surviving spouse;
- Property interests included in the estate that pass or should have passed to or for the benefit of the spouse; then
- Property interests that would have satisfied the elective share interests, but were disclaimed.

Subsection (2) provides that if the above-listed assets are still inadequate to satisfy the elective share, then the unsatisfied balance of the elective share is to be satisfied, in the order prescribed, from the remaining assets belonging to the following classes of recipients:

- Class 1: The decedent's probate estate;
- Class 2: Recipients of specified property interests included in the elective estate; and
- Class 3: Recipients of all other property interests included in the elective estate, except for: charitable deductions for interests in transferred property.

Consequently, the shares in the probate or elective share estate would decline proportionately for the beneficiaries or the remaining recipients, respectively.

Subsection (3) provides that contributions required of the probate estate and a revocable trust may be made in cash or kind.

Subsection (4) provides that any amount of the elective share to be satisfied from the decedent's probate estate, other than from property passing to an inter vivos trust, shall be paid from the

¹⁰This subject matter was relocated to the revised s. 732.206, F.S., relating to elective share amount.

assets of the probate estate in the order prescribed in s. 733.805, F.S., unless otherwise provided in the trust instrument or in the decedent's will.

Subsection (5) provides that any amount of the elective share to be satisfied from trust property is to be paid from the assets of the trust, unless otherwise provided in the trust instrument or in the decedent's will.

Section 8. Liability of direct recipients and beneficiaries

Current Law

There is no existing statutory provision in Part II of the elective share law regarding the liability of direct recipients and beneficiaries.

Effect of Proposed Changes

Section 732.208, F.S., is substantially reworded to delete existing provisions relating to interests of a surviving spouse in addition to an interest in the elective share.¹¹ Instead, this section provides for the liability of direct recipients and beneficiaries of property.

Subsection (1) provides for the amount of liability for certain classes of recipients or beneficiaries to contribute towards the satisfaction of an elective share. This subsection provides that direct recipients are liable for an amount equal to the value apportioned to the members of its class as determined under s.732.205, F.S. Trust and probate estate beneficiaries, however, who receive a distribution of principal after the decedent's death are liable in an amount equal to the principal times the contribution percentage of the distributing trust or estate. "Contribution percentage" and "remaining unsatisfied balance" are defined.

Subsection (2) provides that, in lieu of paying the amount of liability under subsection (1), beneficiaries and direct recipients, may alternatively contribute a proportional part of all property received or contribute all of the property or pay all of the amount equal to the value of property, if sold or exchanged prior to the date of the spouse's exercise of the elective share. "The proportional part of property received" is determined separately for each class of priority recipients and beneficiaries under s. 732.207(2), F.S.

Subsection (3) provides that if a person pays the value of the property as permitted under subsection (2), then no further contribution is required and any unsatisfied contribution is treated as additional unsatisfied balance and reapportioned according to the other classes under s. 732.207, F.S.

Subsection (4) provides that federal law preempts ss. 732.2035, F.S., relating to property entering into an elective share, and 732.207, F.S., relating to sources from which an elective share is payable, such that a person is liable for the return or the payment of the amount or value of the

¹¹This subject matter was relocated in part to the amended s. 732.210, F.S.

item of property or benefit given or paid to the person who would have been entitled to it had it not been preempted by federal law.¹²

Section 9. Valuation of property used to satisfy elective share

Current Law

As stated earlier, s. 732.209, F.S., specifies the sources of assets used in satisfying the elective share but it does not address when the valuation of the property should be made.

Effect of Proposed Changes

Section 9 substantially rewords s. 732.209, F.S., to eliminate provisions relating to the satisfaction of the elective share¹³. Instead this section provides definitions for “applicable valuation date”, “qualifying power of appointment” and “qualifying invasion power.” It also provides valuation dates for different categories of property.

Specifically subsection (1) defines the different “applicable valuation date” for the enumerated categories of property. Subsection (2) defines “qualifying power of appointment” and “qualifying invasion power” for purposes of this section to address the valuation of certain property. In addition, subsection (2), provides the following valuation of certain property:

- If the surviving spouse has a life estate in property, not in trust, then the value of his or her interest is one-half of the value of the property on the valuation date.
- If the surviving spouse holds an interest in a trust that meets the requirements of an elective share trust, then, the value of the interest is a percentage, as listed below, of the value of the principal in trust on the valuation date:
 1. 100 % if the trust instrument includes both a qualifying invasion power and a qualifying power of appointment;
 2. 80% if the trust instrument includes a qualifying invasion power but no qualifying power of appointment; or
 3. 50% percent in all other cases.
- If the surviving spouse is a beneficiary of a trust that meets the requirements of a qualifying special needs trust, then the value of the trust is the value of the principal of the trust, or trust portion, on the applicable valuation date.

¹² This provision is identical to Section 2-210 of the Uniform Probate Code, as amended. Federal law currently preempts any state law relating to who receives the benefit of certain securities such that those securities are not considered part of the elective estate. Under federal law, the Treasury Direct allows securities which are held in the names of two people with right of survivorship to pass free from a surviving spouse’s right of elective share. 31 CFR pt. 357, Appendix A. This provision allows a spouse to create conclusive ownership in a security interest and overrides any inconsistent state law.

¹³This subject matter was relocated to the amended s. 732.207, F.S., relating to sources from which elective share is payable; abatement.

- If the surviving spouse has an interest in a trust that fails to meet the requirements of an elective share trust, then the value of the spouse's interest is the transfer tax value of the interest on the applicable valuation date, provided that the aggregate value of all the spouse's interests in the trust does not exceed one-half of the trust principal.
- The valuation of any policy of insurance on the decedent's life is the net proceeds.
- The value of the right to payments from an annuity or other plan is the transfer tax value of the right on the applicable valuation date.

Subsection (2) also provides that all other property is to be valued at fair market value.

Section 10. Effect of election on other interests

Current Law

A surviving spouse's right to an elective share is in addition to interest in exempt property and allowances provided in Part IV of Chapter 732, F.S., which includes homestead, household furniture, furnishings, appliances up to \$10,000, automobiles in the decedent's name, Florida Prepaid College Program and family allowances. *See* §732.208, F.S. After the elective share is satisfied, the remaining assets of the elective estate are to be distributed as though the surviving spouse predeceased the decedent. *See* §732.211, F.S.

Effect of Proposed Changes

Section 732, 210, F.S, is substantially reworded to delete provisions relating to who may exercise the right of election for an elective share.¹⁴ Instead, this section incorporates almost verbatim existing language in ss. 732.08 and 732.211, F.S., relating to interests in addition to interest in the elective share, and the effect of exercising the elective share on testamentary or statutory disposition.

Section 11. Protection of payors and other third parties

Current Law

There is no existing statutory provisions in Part II of the elective share law regarding liability of bonafide purchasers or other third parties for actions relating to property subject to an elective share.

Effect of Proposed Changes

¹⁴This subject matter was relocated to the amended s. 732.212, F.S., relating to right of election.

Section 732.211, F.S., is substantially reworded to eliminate provisions regarding the effect of the exercise of the right of election on testamentary or statutory disposition.¹⁵ This section provides instead that even though a property interest is included in the decedent's estate, a payor or other third party is not liable for paying, distributing or transferring the property to a beneficiary.

Section 12. Right of Election; by whom exercisable

Current Law

The right of election to an elective share may be exercised by the surviving spouse or by a guardian of the property of the surviving spouse. *See* §732.210, F.S.

Effect of Proposed Changes

Section 732.212, F.S., is substantially amended to delete reference to the time parameter within which to file for an elective share. It retains existing statutory provisions (originally under s. 732.210) regarding a right of election to be exercised by a surviving spouse or the guardian of the property of the surviving spouse but adds that an attorney in fact may also exercise the right of election to an elective share. Moreover, both the guardian of the property and the attorney-in-fact need court approval before exercising the right of election on behalf of the surviving spouse. In the latter case, the court must determine whether the election is in the best interest of the surviving spouse during the spouse's probable lifetime.

Section 13. Time of election; extension; withdrawal

Current Law

A surviving spouse must file for an elective share within 4 months of the date of the first publication of the notice of administration. *See* §732.212, F.S. However, if a preceding occurs involving the construction, admission to probate or validity of the will, the surviving spouse has forty days from the date of termination of the proceedings to file the election. *Id.*

Effect of Proposed Changes

Section 732.213, F.S., is substantially reworded to delete (presumably) obsolete provisions relating to the pre-existing right to dower. This section incorporates existing provisions (originally located in s. 732.212, F.S.) and amends the time in which to file an election of elective share. Specifically, this section revises the statute of limitations period to extend the time to file an election for an elective share from the existing 4 months to either the earlier of 6 months within the date of the first publication of notice of administration or within 2 years after the date of the decedent's death. Within this period, the surviving spouse or attorney in fact, or the guardian of the property of the surviving spouse may petition the court for an extension of time for making an election.

¹⁵This subject matter was relocated to the amended s. 732.210, F.S., relating to the effect of election on other interests.

The election may be withdrawn by the surviving spouse, attorney in fact, guardian of the property or the personal representative of the surviving spouse within eight months of the decedent's death prior to the court's order of contribution.¹⁶ If the election is withdrawn, the court may assess fees and costs against the surviving spouse's estate. A petition for extension of time to make the election or for approval to make the election will toll the statute of limitations.

Section 14. Order of contribution; personal representative's duty to collect contribution

Current Law

Upon the filing of a petition by the surviving spouse or guardian of the property of the surviving spouse, the court is to determine the amount of the elective share and order its payment in cash or kind. See §732.214, F.S. No distribution is required until 6 months from the date of death, when no federal estate tax is required to be filed, or until the tax return is timely filed, when required. Assets distributed in kind are to be distributed at fair market value on the date of the distribution. Common law governs the personal representatives liability arising under his or her fiduciary duties.

Effect of Proposed Changes

Section 732.214, F.S., is substantially reworded to revise the provisions governing the elective share proceedings. Specifically, subsection (1) clarifies that the court must determine the amount of the elective share and the order of contribution. In addition, this section adds that all contributions bear interest at the statutory rate beginning 90 days from the date of the order.

Subsection (2) imposes a new duty on the personal representative (of the deceased spouse's property) to collect contributions from the recipients of the elective share. However, the personal representative is not required to seek collection of any portion of the elective share from property outside his or her control until after the court enters an order of contribution. Additionally, a personal representative may bring an action to collect a contribution or withhold distribution from those whose are required to make a contribution. Specifically, a personal representative may bring an action, after an order of contribution, to collect contribution and any judgment entered must include recovery for costs and reasonable attorneys' fees. A personal representative may also withhold distribution from the beneficiary the amount required to be contributed in satisfaction of the elective share. No such similar provision exists in current law.

Subsection (3) adds that a personal representative with relief from liability of his or her duty to collect contributions if the court finds that it is impracticable to enforce contribution. The personal representative will not be held liable for failure to attempt collection *if* the attempt would have been economically impracticable. The implication is that the personal representative will be held liable if attempts were not made to collect if economically practicable to do so.

¹⁶A personal representative of a surviving spouse would only be designated or appointed subject to the death of a surviving spouse.

Subsection (4) adds that the surviving spouse retains the right, independent of the personal representative, to collect the elective share, and if the spouse brings an action to enforce the elective share, then the judgment is to include costs and reasonable attorney's fees.

Section 15. Effective date; effect of prior waivers; transition rules

Current Law

As stated earlier, a surviving spouse may waive, in part or in full, before or after marriage, the right to an elective share, through the execution of a written agreement. *See* § 732.702, F.S. However, if the waiver agreement is executed after marriage, each spouse must make a fair disclosure of his or her estate. *Id.* There is no such disclosure requirement if the waiver agreement is signed before marriage. *Id.*

Effect of Proposed Changes

Section 732.215, F.S., is substantially reworded to delete provisions relating to the additional tax on a surviving spouse's elective share if the election of the elective share increases any estate, inheritance or other death tax. Instead, this section provides for a transitional period for application of the revised elective share law. The provisions of the bill are effective on October 1, 1999 and are applicable to all decedents dying on or after October 1, 2001. The law prior to October 1, 1999, applies to decedents dying before October 1, 2001.

In addition, this section provides that a waiver of elective share rights executed before the effective date of this bill "which is otherwise" in compliance with s. 732.702, F.S., constitutes a waiver of all rights under the new provisions in ss. 732.201 - 732.214, F.S. Any trust created prior to the effective date that meets the requirements of an elective share trust is treated as though the trust was created after the effective date and in satisfaction of the elective share.

Lastly, this section provides that ss. 732.201 - 732.215, F.S., are inapplicable and otherwise do not affect the rights of spouses in dissolution of marriage under chapter 61, F.S.

Section 16 provides that irrevocable contracts entered into before October 1, 1999, are not affected by the provisions of this bill.

Section 17 provides an effective date of October 1, 1999.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Since the bill does not preclude a person from transferring or devising property, it does not appear to infringe on a person's right to property as recognized under the Florida Constitution. *See art. I, § 2, Fla. Const.; Shriners' Hospital for Crippled Children v. Zrillic*, 563 So.2d 64 (Fla. 1990).

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill may continue to advance the public policy interest in ensuring that a surviving spouse is provided sufficient support and is compensated for his or her contribution to a marriage. In addition, it may help to deter the inequity, identified by the courts, created when a deceased spouse uses an "inter vivos trust" as a "will substitute" to defeat a surviving spouse's elective share.

This bill may also encourage more surviving spouses to exercise the right to the elective share since the bill modifies how the elective share is calculated by expanding the category of property assets to be included in the determination of the amount of the elective share. Clients may incur additional attorneys' fees and costs related to the valuation requirements of property assets under the bill. Additionally, the issue of proper valuation of property assets may be the subject of potential litigation challenging the reasonableness of the valuation.

C. Government Sector Impact:

This bill does not have a significant fiscal impact on state or local governments. However, the courts may experience an increase in judicial workload resulting from court involvement in any cases resulting from an increased exercise of the elective share since the bill expands the assets available in the decedent's estate. Both the state and counties incur expenses in support of the judicial branch.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
