

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 402

SPONSOR: Judiciary Committee and Senator Burt

SUBJECT: Probate Code

DATE: March 14, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Johnson	JU	Favorable/CS
2.	_____	_____	APJ	_____
3.	_____	_____	AP	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill makes extensive substantive, grammatical, and stylistic changes to the Florida Probate Code and related statutes, as proposed by the Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar. Some of the major changes are as follows:

- Defers to procedural matters established in Florida Probate Rules by eliminating duplicative statutory provisions.
- Reconciles statutory conflicts relating to the inheritance rights of adopted persons.
- Integrates the Medicaid claims system into the estate claims system and provides a six month time limit for presentation of Medicaid claims against the estate.
- Creates a specific procedure for notice to creditors distinct from the notice of administration procedure to beneficiaries.
- Revises specified rights and duties of personal representatives and other fiduciaries, creditors, beneficiaries and interested persons in estate administration.
- Clarifies the replacement and transition process for a change of personal representative due to death, removal, resignation or other disqualification.
- Modifies the method for opening a safe deposit box.
- Eliminates the family administration procedure as a probate option for small estates
- Increases the jurisdictional amounts for summary administration of small estates from \$25,000 to \$75,000 and for ancillary administration of small estates for nonresidents from \$25,000 to \$50,000.
- Increases the surviving spouse's share of intestate estate from \$20,000 to \$60,000.
- Increases the family allowance from \$6,000 to \$18,000 to account for inflation.
- Corrects glitches in elective share provisions and adds provisions relating to protective homestead property as exempted from elective estate, and charitable lead interests as additional source from which to pay elective share

- Transfers, in its entirety, Part X, of ch. 732, F.S., relating to anatomical gifts, to ch. 765, F.S., relating to Health Care Advance Directives.
- Creates new provisions expressly prohibiting trustee from making distributions pending contest of validity of trust or determination of beneficiaries.

This bill substantially amends each chapter of the Florida Probate Code (ch. 731-738, F.S.) and the following related statutory provisions: 63.172, 215.965, 409.9101, 655.936, and 660.46. The following sections are repealed: 731.107, 731.111, 733.203, 733.401, 733.507, 733.605, 735.101, 735.103, 735.107, and 735.209. The following sections are created: 733.2121, 733.31, 733.5035, 733.5036, 733.5061, 733.6065, and 737.3061.

II. Present Situation:

Chapters 731-738, F.S., encompass the Florida Probate Code (hereinafter “Code”). The Code sets forth the process for distribution of assets and payment of obligations subsequent to a person’s death. This bill represents the culmination of a three-year effort by the Probate Law Committee (a subcommittee of the Real Property, Probate, and Trust Law Section of the Florida Bar) to conduct the first major overhaul of the Code and related provisions since the Code was first enacted in 1974. A number of grammatical and stylistic changes are made throughout the bill, some of which have been specifically mentioned. Other changes are substantive in that they affect specified persons’ rights and duties under the Code and the procedures for their enforcement.¹ The following “Section-by-Section Analysis” provides a more detailed explanation of the present situation and the effect of the changes as applicable to each section of the bill.

Chapter 63, F.S. Adoption

Section 1 amends s. 63.172, F.S., relating to the effect of a judgment of adoption on legal relationships.

Present Situation: Under chapter 63, F.S., a judgment of adoption terminates *all* legal relationships, including rights of inheritance between the adopted person and the natural parents and former relatives. The adopted person is then considered a lineal descendent of the adopting parent as if born to the adopting parent and as a relative of the adopting parent’s family. In contrast, chapter 732, F.S. (s.732.108, F.S.), provides three exceptions under which a legal relationship between an adopted person and his or her natural or deceased parent or that parent’s relative may still exist for purposes of intestate succession and inheritance:

- (a) When the person is adopted by a natural parent’s spouse.
- (b) When the person is adopted by a natural parent’s spouse who married the natural parent after the death of the other natural parent.²

¹ See <http://www.flabarrppl.org/probaterevs.html> for details governing the process and participants.

² E.g., Adam is the son of Alice and John, an only child. After John dies, Alice remarries and her new husband adopts Adam. Sometime later, John’s parents die intestate. Assuming that under the laws of intestacy, John would be the sole heir to John’s parent’s estate. Under s. 63.172, F.S., Adam, as an adopted child can not receive anything because his legal rights between

(c) When the person is adopted by a close relative, as defined in s. 63.172(2).

Effect of Proposed Changes: It resolves the statutory conflict between s. 63.172, F.S., and s. 732.108, F.S., by expressly providing that the rights of adopted persons to inherit from the natural parent or family shall be determined by the provisions of s. 732.108, F.S., in the Probate Code.

Chapter 409 Social and Economic Assistance

Section 2 amends s. 409.9101, F.S., relating to the Medicaid Estate Recovery Act.

Present Situation: Chapter 409, F.S., governs state social welfare programs including Florida's Medicaid program. The program is administered by the Agency for Health Care Administration (AHCA). The acceptance of public medical assistance through Medicaid creates a claim against the estate in favor of AHCA for the debt based on the total amount paid to or for the benefit of the Medicaid recipient for medical assistance after he or she reached 55 years of age. In accordance with federal law as a requisite for all states participating in the Medicaid program, Florida established the "Medicaid Estate Recovery Act." *See* 42 U.S.C. § 1396p(b). The program provides a mechanism for the estate to recover from the estates the cost of Medicaid services provided to certain individuals during their lifetime. *See* s. 409.9101, F.S.

Every personal representative of an estate is required to serve a copy of the notice of estate administration on AHCA. *See* s. 409.9101(3), F.S. At the time of filing a claim, AHCA may reserve the right to amend the claim at any time based on medical claims submitted by providers subsequent to AHCA's initial claim calculation. Medical providers have one year from the time of providing service to file a claim for reimbursement.³ However, the general time period for filing a claim in a probate case is 3 months from the date of first publication of the notice of administration. *See* s. 733.702, F.S. A probate case claim may be amended as a matter of right within that 3 month period. Consequently, this time period still expires before the one year deadline for providers to bill Medicaid. This time period has sometimes constrained AHCA's ability to exercise its right of reimbursement for Medicaid claims for third-party liability. *See* s. 409.910, F.S.⁴

his former family were terminated. However, under s. 732.108(1)(b), Adam appears to still be entitled to the intestate estate of his natural father's parents.

³ 42 U.S.C. § 1395f(a)(1) provides that a Medicaid provider shall have up to the end of the 3rd calendar year to present a claim for reimbursement, but that the Secretary of the Department of Health and Human Services may reduce the time period for presenting a claim to no less than 1 year. Although it is widely asserted that the one year limit applies in Florida, the only mention of the limit found in Florida law is a repealed section of the Florida Administrative Code. *See*, F.A.C. 59G-5.090, repealed effective May 8, 1997.

⁴ *Estate of Shearer v. Agency for Health Care Administration*, 737 So.2d 1229 (Fla. 5th DCA 1999) (ruling that 3-month limitation is absolute and thus the court's denial to allow amendment of claim from \$28,209.14 to \$108,088.55 cost the state \$79,879.41). In contra, see *Agency for Health Care Administration v. Estate of Johnson*, 743 So.2d 83 (Fla. 3rd DCA 1999) (ruling that the filing of a lien in the public records was sufficient to constitute a claim in the probate case, thereby requiring estate to pay \$697,356.89 to the state for a claim that was never properly filed in the probate cases).

The value of AHCA's Medicaid claim is based on the current total allowable amount of Medicaid payments as denoted in the agency's provider payment processing system at the time the agency's claim or amendment is filed. The agency's provider processing system reports are admissible as prima facie evidence in substantiating the agency's claim. A claim of AHCA under s. 409.9101, F.S., is a Class 3 claim.⁵

The enforcement of a AHCA's Medicaid claim may not be made against a deceased Medicaid recipient who was 55 years of age or older at the time of death, and was survived by a spouse, by a child under 21 years of age, or by a child who is blind or permanently and totally disabled pursuant to the eligibility requirements of Title XIX of the Social Security Act. It similarly can not be enforced against the deceased Medicaid's recipient's property determined to be homestead and determined to be exempt from creditors' claims. Section 4, Art. X of the *Florida Constitution*, provides the constitutional homestead exemption; however, numerous statutes provide that other specified property beyond the constitutional minimum is exempt from the claims of creditors in estate proceedings.⁶ Moreover, AHCA may not recover from an estate upon a determination that doing so would cause *undue hardship* for the qualified heirs. *See* s. 409.9101(10), F.S. The personal representative, or any heir, must petition for a determination of hardship based on statutory criteria.

However, where there are no liquid assets to satisfy the Medicaid estate-recovery claim, nonhomestead real property must be sold, unless the costs of sale exceed the proceeds. *See* s. 409.9101(12), F.S.

Effect of Proposed Changes: Subsection (3) of s. 409.9101, F.S., relating to the notice on AHCA is relocated and revised in the new s. 733.2121, F.S., which creates a separate provisions for notice to creditors of an estate administration. Notice requirements to AHCA are still limited to estates where the decedent was 55 years of age or older at the time of death, and was not survived by a spouse, by a child under 21 years of age, or by a child who is blind or permanently and totally disabled pursuant to the eligibility requirements of Title XIX of the Social Security Act. *See* s. 409.9101(6), F.S., and also s. 733.2121(2)(d), F.S., as created by this bill.

It clarifies that AHCA has standing as an "interested person" upon filing of a statement of claim for purposes of probate proceedings.⁷ It extends the time for AHCA to file an amended

⁵Section 733.707(1), F.S., provides a classification system for claims in probate proceedings, whereby all claims in a class must be paid before any claim in the following class or classes may be paid.

⁶ For example, the constitutional homestead protection for personal property is \$1,000. Section 732.402(2)(a), F.S., provides that the surviving spouse, or the children of the decedent, are entitled to the following property notwithstanding creditor claims (other than perfected security interests): Household furniture, furnishings, and appliances up to a value of \$10,000, and all automobiles in the decedent's name and regularly used by the decedent or members of the decedent's immediate family.

⁷ "Interested person" is a defined term in the Probate Code and as such entitles that person to notice at specified stages of the probate proceedings. *See* s.731.201(21), F.S.

claim for probate proceedings to 6 months from the date of service of the notice to creditors⁸ on AHCA. It deletes the requirement that AHCA base its claim on the current total allowable amount of Medicaid payments as denoted in the agency's provider payment processing system at the time the agency's claim or amendment is filed. It relocates the provision in s. 409.9101, F.S., that a Medicaid reimbursement claim is a Class 3 claim to s. 733.707(1), F.S., as amended by this bill.

It expands the property exempt from a claim under s. 409.9101, F.S., from the constitutional minimum to all property "exempt from the claims of creditors under the constitution or laws of Florida". It revises the threshold in a determination of hardship from "undue hardship" to "hardship" for purposes of prohibiting recovery by AHCA against the beneficiary (substitution of term from "qualified heir").

It expands the category of assets that must be sold to pay a Medicaid estate-recovery claim under 409.9101, F.S., to include nonexempt personal property.

Chapter 655, F.S. Financial Institutions Generally

Section 3 amends s. 655.936 F.S., regarding safe-deposit boxes in financial institutions.

Present Situation: The contents of a safe-deposit box or property must be delivered to a personal representative upon presentation of his or her letter of authority. A decedent's safe-deposit box can only be opened initially in the presence of an employee of the financial institution and the personal representative. They both must prepare and sign an inventory of the box contents. The inventory must be filed with the probate court within 10 days. Only specified persons are allowed to view the filed inventory. *See* s. 733.604(1), F.S.

Effect of Proposed Changes: The procedure for the initial opening of a decedent's safe-deposit box is modified by deleting the old provisions and including a cross-reference to s. 733.6065, F.S., which allows any two of the following persons to conduct the opening: an employee of the financial institution, the personal representative, or the personal representative's attorney of record. These two persons must inventory the contents of the box. A copy of the inventory and the box entry record 6 months prior to the decedent's death and up to the date of inventory must be filed with the court within 10 days after the box is opened. In addition, the personal representative has specific authority to remove the box contents.

Chapter 731, F.S. Probate Code: General Provisions

Section 4 amends s. 731.005, F.S., regarding the short title of the Florida Probate Code, making grammatical changes only.

⁸ Current law requires that a copy of the "notice of administration" be furnished to known or reasonably ascertainable creditors. The bill splits the notice requirements into a Notice of Administration for beneficiaries and a Notice to Creditors for known or reasonably ascertainable creditors.

Section 5 amends s. 731.011, F.S., relating to the procedure for the determination of substantive rights under the Probate Code.

Present Situation: Section 731.011, F.S., provided an effective date for incorporation of the 1976 changes to the Probate Code. It also provided that the procedures for enforcement of rights are set forth in the Probate Code. However, Article V, s. 2, of the *Florida Constitution*, provides that the “supreme court shall adopt rules for the practice and procedure in all courts.” In 1984, the Florida Supreme Court directed the Probate and Guardianship Rules Committee to study the Florida Statutes, and to write into the Probate Rules those matters of procedure contained in the Probate Code.⁹ Consequently, the same or similar procedures in statute are duplicated in court rules.¹⁰

Effect of Proposed Changes: It provides that rights set forth in the Florida Probate Code shall be governed by the procedures for enforcement as set forth in the Florida Probate Rules.

Section 6 amends s. 731.104, F.S., regarding verification of documents as required by the Probate Code or the Probate Rules, to provide that the Florida Probate Rules shall govern the form of the oath of affirmation. The form for verification is already contained in Fla. Prob. R. 5.020(e).

Section 7 amends s. 731.106, F.S., regarding assets of nondomiciliaries, to change grammar and style.

Section 8 repeals s. 731.107, F.S., regarding adversary proceedings¹¹ in probate as governed by the Rules of Civil Procedure. This provision is no longer necessary as these proceedings are governed by the procedure in Fla. Prob. R. 5.025(d)(2).

Section 9 amends s. 731.110, F.S., regarding caveats.

Present Situation: A caveat is a request made and filed (with the court) by an interested person, to be notified if a probate case is filed regarding the deceased person named in the caveat. A caveat must include the deceased person’s name and social security number or date of birth, if known. A caveat filed by an individual or company not domiciled in the county where the caveat is filed must also provide the name and residence address of a resident of the county who may be formally served with the notice of administration.

⁹ *The Florida Bar Re Emergency Amendments To Florida Rules Of Probate And Guardianship Procedure*, 460 So.2d 906, (Fla. 1984).

¹⁰ In 1988, the Probate and Guardianship Rules Committee recommended that the Legislature repeal those portions of the statutes that are procedural when there are similar rules already in place, or when similar new rules are added. The co-existent procedural provisions in statutes and the court rules was deemed detrimental to the orderly process of the court, particularly when they diverged. See *The Florida Bar*, 537 So.2d 500, 501 (Fla. 1988).

¹¹ Adversary proceedings in probate include proceedings to remove or surcharge a personal representative, probate a lost or destroyed will or later-discovered will, determine beneficiaries, construe a will, cancel a devise, partition property, determine pretermitted share, and revocation of probate of a will and any other probate proceeding declared to be adversary or determined to be adversary by the court.

Effect of Proposed Change: The caveat must also include the decedent's last known residence, if known, as identifying information. In addition, it specifies that if a member of the Florida Bar is named as the resident of the county upon whom notice may be served, the attorney may list an office address in lieu of a residence address.

Section 10 repeals s. 731.111, F.S., regarding notice to creditors. Subsection (1) governing the publication of notice to creditors is generally procedural and already covered by Fla. Prob. R. 5.240. The provisions of subsection (2) governing specific notice requirements to the Florida Department of Revenue are relocated to s.733.702(5), F.S., as created by this bill.

Section 11 amends s. 731.201, F.S., regarding definitions. In addition to grammatical and stylistic changes, the definitions are made applicable to s. 409.9101, F.S. (the Medicaid Estate Recovery Act). In addition, the following substantive changes to specific definitions are made:

- The term “authenticated” is defined by reference to the Federal Rules of Civil Procedure in lieu of by reference to 28 U.S.C. § 1733 (Government records and papers) or 28 U.S.C. § 1741 (Foreign official documents) which do not define what is an “authenticated” document. Rule 44 of the Federal Rules of Civil Procedure, entitled “Proof of Official Record”, references authenticated documents. Authenticated documents are used in probate proceedings in regards to documents from other states or countries that are filed in the probate.
- The terms “devise,” “devisee,” and “distributee,”¹² are amended to apply also in trust planning. Increasingly, estate planners are using trusts that include a testamentary disposition as an estate planning tool partially or completely in lieu of a will.
- The terms “formal notice,” “informal notice,” or “notice” for the procedures for giving notice in probate proceedings are revised to replace the reference to s. 731.301, F.S., with a reference to the Florida Probate Rules.
- The term “protected homestead” is newly defined by reference to Art. X, s. 4, of the *Florida Constitution*, which provides a homestead exemption.¹³ It also reiterates constitutional language that this homestead exemption benefits a surviving spouse or heirs of the owner. However, it expressly states that property owned as tenants by the entirety¹⁴ is not protected homestead.

¹² “Devise” means a testamentary disposition of real or personal property by will. s. 731.201(8), F.S. “Devisee” means a person designated by a will to receive a devise. s. 731.201(9), F.S. “Distributee” means a person who has received estate property from a personal representative other than as a creditor or purchaser. s. 731.201(10), F.S.

¹³ The phrase “homestead exemption” refers to the person’s home as exempt from forced sale under process of any court (with certain exceptions and limitations). It is also commonly used to describe the \$25,000 deduction from the value of a home used in calculating the taxable value of a personal residence. That homestead exemption is not affected by, nor is it applicable to, the homestead exemption in this section.

¹⁴ Property owned as tenant by the entirety is a “tenancy which is created between a husband and wife and by which together they hold title to the whole with right of survivorship so that . . . [i]t is inherited by the survivor of the two.”¹⁴ Title to a homestead owned by a husband and wife is held as a tenancy by the entireties, but other property may also be held by a husband and wife as a tenancy by the entireties.

Section 12 amends s. 731.301, F.S., regarding formal and informal notice to interested persons. It eliminates the statutory procedures for notice and defers to the court rules for notice (specifically Fla. Prob. R. 5.040).

Section 13 amends s. 731.303, F.S., regarding representation in proceedings involving estates of decedents or trusts. It deletes the duplicative provisions regarding pleading requirements already set forth in court probate rules and also makes grammar and stylistic changes.

Part I of Chapter 732 Intestate Succession¹⁵

Section 14 amends s. 732.101, F.S., regarding intestate estate to clarify that vesting applies to the heir's right to *the decedent's* property.

Section 15 amends s. 732.102, F.S., regarding intestate share of other heirs.

Present Situation: If a decedent has no surviving lineal descendants (no children), his or her surviving spouse inherits the entire estate. If the decedent is survived by lineal descendants, all of whom are lineal descendants, the spouse receives the first \$20,000 of the intestate estate, plus one-half of the balance of the intestate estate. Valuation is calculated on fair market value on the date of the decedent's death.

Effect of Proposed Changes: It increases the \$20,000 sum to \$60,000 to account for inflation.¹⁶ Additionally, the date for valuation is changed to the date of distribution. Also, grammar and style changes are made, and the section is more logically numbered.

Section 16 amends s. 732.103, F.S., regarding the intestate share of heirs, to make grammatical and stylistic changes only.

Section 17 amends s. 732.107, F.S., regarding escheat (or reversion of property to the state).

Present Situation: The law on escheat governs the disposition of property of a decedent when no lawful heir exists to claim the property. Escheat property is turned over to the State. A lawful heir may claim the escheated property within ten years from the date the letters of administration were entered. The lawful heir is also entitled to interest at the same rate as a judgment. A personal representative who believes that property of an estate may escheat to the state, or who is in doubt as to who is the lawful beneficiary of estate property, is required to institute a proceeding to determine beneficiaries within one year of when the letters of administration are entered. The Department of Legal Affairs must be served a copy of the petition to determine heirs. If a personal representative fails to timely file a petition to determine heirs, the Department of Legal Affairs may do so. The clerks of court are required to annually furnish a list to the Department of Legal Affairs of all estates being administered in

¹⁵The laws on intestate succession govern how property is distributed among heirs when the decedent dies without leaving a valid will.

¹⁶ According to a calculation by the American Institute for Economic Research, using the Consumer Price Index calculated by the United States of America, Bureau of Labor Statistics, \$20,000 in 1974 equals \$60,316 in 2000. <http://www.aier.org>.

which no person appears to be entitled to the property and in which the personal representative has not filed a petition to determine heirs. Once the court determines that there is no person entitled to the estate and that the estate escheats, the property can be sold and the proceeds given to the state's Treasurer for deposit in the State School Fund.

Effect of Proposed Changes: It removes procedural matters that are already covered by Fla. Prob. R. 5.386. An estate can be reopened within a ten-year period as measured from the date on which the escheated funds are paid to the State Treasurer rather than the earlier date of when the letters of administration are entered.¹⁷ In addition, it eliminates the requirement that the court make a determination that there are no persons entitled to the property prior to the sale of such escheated property. There is no requirement that the entitlement include interest. It adds that Florida-certified public accountants to the list of persons who may be assigned the right to receive proceeds on behalf of persons entitled to such escheated property.

Section 18 amends s. 732.1101, F.S., regarding aliens having the same rights of inheritance as citizens, to make grammatical and stylistic changes only.

Part II of Chapter 732, F.S. Elective Share of Surviving Spouse

Section 19 amends s. 732.2025, F.S., regarding definitions in the Elective Share provisions of the Probate Code (ss. 732.2025-732.2155), to clarify that the value of qualifying special needs trust is determined on the "applicable valuation date" as provided in s. 732.2095(1).

Sections 20 and 21 amend s. 732.2035, F.S., and s. 732.2045, F.S., relating to elective estate property and exempted property,.

Present Situation: The elective estate consists of the sum value of property interests under 9 categories, subject to exclusions, including but not limited to, the probate property, ownership interests in accounts and securities, insurance policies, joint bank accounts, specified trusts, and retirement plans. Section 732.2045, F.S., specifies the circumstances under which property shall be excluded from the determination and value of an elective estate, including property held in a qualifying special needs trust and property included in the gross estate for federal estate tax purposes.

Effect of Proposed Changes: It clarifies that the definition for "decedent's ownership interest" means one half the value of an account or security if it is held in tenancy by the entirety. In all other cases, the interest means that portion of the account or security which the decedent could rightfully withdraw or use prior to his or her death. This section also adds annuity trusts and unitrusts to the types of arrangements under which a right of payment might arise for purposes of determining the portion of property to which someone is entitled. Section 732.2045, F.S., is amended to add protected homestead property as excluded from the determination and value of an elective estate.

¹⁷This starting date is intended to facilitate and simplify administration. See comments by Probate Law Committee (9/1/2000).

Section 22 amends s. 732.2055, F.S., relating to valuation of an elective estate. It adds that claims for paid funeral and burial expenses which have been previously excluded are also included as part of all claims to be deducted from the total value of the property when determining the fair market value of the property for purposes of valuing the elective estate.

Section 23 amends s. 732.2075, F.S., relating to sources payable to the elective share.

Present Situation: When assets are insufficient to pay an elective share, the specified property assets are appropriated to satisfy the balance of the elective share according to a 3-tiered priority scheme of sources. Property passing to or for the benefit of a surviving spouse through a decedent's will or a trust referenced in a will are applied first to satisfy the elective share. Thereafter, a succession of property may be drawn upon to satisfy the elective share. If those assets are still insufficient, then the unsatisfied balance is to be satisfied from the remaining assets of recipients in the following 3 classes, in the order prescribed: Class 1 (probate estate and revocable trust), Class 2 (specified property interests), and Class 3 (all other property).

Effect of Proposed Changes: It creates a fourth class of assets from which to draw to satisfy an elective share. Class 4 refers to recipients of protected charitable lead interests defined as a protected charitable interest where one or more deductible interests in charity precede some other nondeductible interest or interests in the property.

Section 24 amends s. 732.2085, F.S., relating to the liability of direct recipients and beneficiaries. It corrects a cross-reference.

Section 25 amends s. 732.2095, F.S., relating to the valuation of property used to satisfy an elective share, to correct a glitch in law where qualifying needs trust was omitted in last year's legislation.

Section 26 amends s. 732.2105, F.S., relating to the effect of an election to an elective share on other interests, to delete the requirement that the elective estate be administered as though the surviving spouse had predeceased the decedent.

Section 27 amends s. 732.2125, F.S., relating to the right of election, to make a grammatical and stylistic change.

Section 28 amends s. 732.2135, F.S., relating to the timing, extension and withdrawal of an election to an elective share.

Present Situation: The elective share is the right of a surviving spouse to a minimum share of their deceased spouse's estate. A spouse who files an election to take the elective share foregoes the inheritance in the will, and takes the elective share instead. An election to take the elective share must be filed by the earlier of 6 months after the date of publication of the notice of administration, or 2 years after the death of the decedent.

Effect of Proposed Changes: It removes reference to the date of the publication of the notice of administration. The election to take the elective share must be filed within 6 months after

service of the notice of administration on the surviving spouse or legal representative of the surviving spouse, or 2 years after the decedent's death, whichever is earlier. This change conforms to other changes in this bill that eliminates reference to the publication of the notice of administration. Grammatical and stylistic changes are also made.

Sections 29, 30, 31, and 32 amend the following sections respectively, to make grammatical and stylistic changes only:

- s. 732.2145, F.S., relating to the order of contribution and the personal representative's duty to collect contribution.
- s. 732.2155, F.S., regarding effective date; effect of prior waivers; and transition rules regarding the elective share (includes a clarification to cross-references).
- s. 732.218, F.S., regarding rebuttable presumptions related to the Florida Uniform Disposition of Community Property Rights at Death Act.
- s. 732.219, F.S., regarding disposition upon death under the Florida Uniform Disposition of Community Property Rights at Death Act.

Sections 33, 34, and 35 amend respectively, s. 732.221, F.S. (perfecting title of community property by a personal representative or beneficiary, s. 732.222, F.S. (relating to purchaser for value or lender of community property), and s. 732.223, F.S. (perfecting title to community property by a surviving spouse).

Present Situation: Sections 732.216 through 732.228, F.S., are known as the Florida Uniform Disposition of Community Property Rights at Death Act. "Community property" is a legal concept followed by some of the states regarding property owned by married persons. In a community property state, all property owned by a married person is owned jointly with the spouse, and each spouse owns an equal one-half share of the property. Nine states are community property states, Florida is not a community property state. An individual who formerly lived in a community property state and was married while living there may move to Florida, and still own, on the date of death, property subject to community property laws in that other state. A personal representative has no duty to discover whether any property of the deceased is community property unless a written demand is made by an interested person within 6 months after first publication of the notice of administration. *See* s. 732.221, F.S. This section is similar to s. 732.223, F.S., regarding perfection of title in the surviving spouse. The personal representative has no duty to discover whether property held by the decedent is community property unless the surviving spouse makes a written demand within 6 months after the first publication of the notice of administration. A surviving spouse may perfect title in community property by court order or by court approval of an instrument of title signed by the personal representative or heirs. *See* s. 732.223, F.S.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, the bill reduces the time limit from 6 months to 3 months for filing a written demand as measured from the date of service of the notice of administration (as to beneficiaries or surviving spouse) or from the date of the first publication of the notice (as to creditors).

**Part III of Chapter 732, F.S.
Pretermitted Spouse and Children**

Section 36 amends s. 732.302, F.S., regarding pretermitted children.

Present Situation: The purpose of this provision is to avoid the unintentional or inadvertent disinheritance of a child who was born or adopted after the decedent executed a will being probated. If a pretermitted child is not provided for by the will, the pretermitted child is entitled to a share equal to what the child would have received had the testator died intestate. However, a pretermitted child will not receive the pretermitted share of the estate if it appears from the will that the omission was intentional, or if the testator had one or more children when the will was executed and the will gives substantially all of the estate to the other parent of the pretermitted child.

Effect of Proposed Change: It adds a qualifier applicable to the exception in which a pretermitted child will not receive his or her share of an intestate estate if substantially all of the estate is devised by will to the pretermitted child's other parent. In order for this exception to apply, the other parent must have survived the testator and have been entitled to take under the will.¹⁸ Grammatical and stylistic changes are also made.

**Part IV of Chapter 732, F.S.
Exempt Property and Allowances**

Section 37 amends s. 732.401, F.S., regarding descent of homestead.

Present Situation: Homestead property is exempt from creditor claims whether the decedent died testate or intestate. As such, it is distributed to beneficiaries notwithstanding the claims of creditors, but subject to any mortgage or lien. Ordinarily, homestead property will pass to heirs under the same rules as other property (other than the liability for debts of the decedent), except that if the decedent died intestate and was survived by a spouse and by lineal descendants, the spouse receives a life estate and the lineal descendants alive at the time of the decedent's death receive a vested remainder interest.¹⁹

Section 732.104, F.S., provides that all intestate distributions are to be "per stirpes".²⁰

¹⁸ The phrase "and that other parent survived the testator and is entitled to take under the will" is from Section 2-302 of the Uniform Probate Code.

¹⁹ A life estate is the legal right to exclusive possession of real property until one's death. A vested remainder interest means that lineal descendants own the homestead property, but cannot take possession of it until the surviving spouse dies.

²⁰ "Per stirpes" means that property is proportionally divided between beneficiaries according to their deceased ancestor's share. Black's Law Dictionary, 7th edition. The antithesis is *per capita* which has distribution made equally among all individuals usually in the same class. In *Snyder v. Davis*, 699 So.2d 999 (Fla. 1997), the Florida Supreme Court ruled that homestead protections apply to all persons who are potential heirs under the intestacy laws. In light of that decision, it is arguable that all lineal descendants, and not just those that would inherit on a per stirpes basis, would be entitled to the vested remainder interest.

Effect of Proposed Changes: It provides that intestate distribution of the vested remainder interest in homestead property is “per stirpes”. It also makes grammatical and stylistic changes.

Section 38 amends s. 732.4015, F.S., regarding devise of homestead.

Present Situation: Section 732.4015(1), F.S., restates the portion of the *Florida Constitution* which provides that a homestead is not subject to devise if a spouse or minor child survives the owner, except that the homestead may be devised to the owner’s spouse if there is no minor child. Subsection (2) provides that “owner” includes the settlor of a trust over which the settlor reserved the right to amend or revoke the trust. This subsection (2) roughly and briefly describes what is commonly referred to as a revocable trust. A more comprehensive definition for a revocable trust can be found in s. 733.707(3), F.S.

Effect of Proposed Changes: It replaces the archaic term “settlor” with the term “grantor” and it also provides that “owner” includes the grantor of a revocable trust as defined at s. 733.707(3), F.S. Grammatical and stylistic changes are also made.

Section 39 amends s. 732.402, F.S., regarding exempt property.

Present Situation: The Probate Code exempts certain property from estate claims. Exempt property is property that is exempt from the claims of creditors, and thus is given to beneficiaries notwithstanding whether there are sufficient assets to pay all of the claims against the estate. Section 733.402(4), F.S., provides that exempt property set forth in the Probate Code is in addition to property passing to the spouse or heirs of the decedent pursuant to the homestead provisions of the Florida Constitution, property passing under the will, or by intestate succession, elective share, or family allowance. A person claiming entitlement to exempt property must petition the court for a determination that the property is exempt within 4 months of the first publication of the notice of administration. The value of exempt property is excluded when calculating the value of the estate for residuary, intestate, pretermitted, or elective share purposes.²¹

Effect of Proposed Changes: It clarifies that exempt property shall be in addition to protected homestead, statutory entitlements, and property passing under the will or by intestate succession. The term “protected homestead” is defined in this bill (s. 731.210(29), F.S.) The term “statutory entitlements” is not defined. Statutory entitlements may presumably overlap with exempt property and homestead but would most likely include elective share, pretermitted share, family allowance, and any other property that a person is entitled to receive from an estate by statute. This section is also revised to measure the 4-month period from the date of service of the notice of administration in lieu of from the date of publication of notice of administration.

²¹ See *Walker v. Redding*, 23 So. 565 (Fla. 1898) (homestead real property is not part of the estate); s. 732.402(4), F.S. (as to intestate estate); *Solomon v. Dunlap*, 372 So.2d 218 (Fla. 1st DCA 1979) (pretermitted share determined on “net” value of estate); and ss. 732.2105 & 732.402(4), F.S. (as to elective share). The residuary estate is the net estate after payment of all charges, debts, costs, and specific requests. *In re: Estate of Miller*, 301 So.2d 137 (Fla. 4th DCA 1974).

Section 40 amends s. 732.403, F.S., regarding family allowance.

Present Situation: A spouse or lineal heir²² of the deceased that was dependent upon the decedent for support may petition the probate court for a family allowance. The family allowance is an immediate distribution of monies to assist the dependent with living expenses during the probate case. A family allowance is not automatic, the dependent must petition the court. The family allowance is a class 5 claim.²³ If awarded, the family allowance is not chargeable against any benefit or share passing to the dependent by intestate succession, elective share, or by will, unless the will otherwise provides. The family allowance that may be paid from a decedent's estate is limited to \$6,000, which limit has remained the same since the Probate Code was enacted in 1974.

Effect of Proposed Changes: The allowance cap is increased from \$6,000 to \$18,000 to account for inflation.²⁴

Part V of Chapter 732, F.S. Wills

Section 41 amends s. 732.501, F.S., regarding who may make a will.

Present Situation: Any person 18 years of age or older and who is of sound mind may make a will. Under chapter 743, F.S., an emancipated minor²⁵ has all the legal rights of an adult, including the right to make a valid will.

Effect of Proposed Changes: It clarifies that an emancipated minor may make a will. Also, grammar and style changes are made.

Section 42 amends s. 732.502, F.S., regarding execution of wills, to make grammatical and stylistic changes.

Section 43 amends s. 732.503, F.S., regarding self-proof of will.

Present Situation: A valid will or codicil, under Florida law, requires execution by the maker and two witnesses. For a will to be admitted to probate, it must be "proved" (authenticated).

²² For purpose of this section, the term "lineal heir" means lineal ascendants (parents, grandparents, great-grandparents, and so forth), and lineal descendants (child, grandchildren, great-grandchildren, and so forth).

²³ See s. 733.707, F.S., relating to the priority schedule order (8 classes) of payment of obligations by the estate. Class 5 is family.

²⁴ According to a calculation by the American Institute for Economic Research, using the Consumer Price Index calculated by the United States of America, Bureau of Labor Statistics, \$6,000 in 1974 equals \$18,095 in 2000. <http://www.aier.org>. The figure is rounded for ease in use and practice.

²⁵ Chapter 743, F.S., provides procedures under which certain minors may have the disabilities of nonage removed, i.e., become an emancipated minor.

For a will that does not contain a self-proof to be admitted to probate, one of the subscribing witnesses must certify to the authenticity of the will. Because wills are often admitted to probate many years after their making, finding one of the witnesses is often difficult. Thus, will drafters will typically include a self-proof section in conformity with s. 732.503, F.S.

A self-proof requires that a notary be present at the will signing in addition to the two witnesses and the testator. The self-proof form requires a sworn statement by the testator and each of the witnesses, which under notary laws requires a formal swearing in and a formal affirmation that statements made are true and correct, as if the document were an affidavit.²⁶ Notary laws also allow for documents to be “acknowledged”, whereby the signer of the document is acknowledged by the notary to be the person named. A will that includes a self-proof in conformity with Florida law but executed in another state may be admitted to probate as if self-proved under Florida law.

Effect of Proposed Changes: It revises the self-proof form to require an acknowledgement before an officer authorized to administer oaths rather than limiting to one taken by a notary public. It also provides that a will which complies with the self-proof provisions of the state where executed is considered to have complied with Florida law regarding self-proof of wills.

Sections 44, 45, 46, and 47 amend the following sections respectively, to make grammatical and stylistic changes:

- s. 732.505, F.S., regarding revocation by writing.
- s. 732.507, F.S., regarding effect of subsequent marriage, birth, or divorce.
- s. 732.513, F.S., regarding devises to trustee.
- s. 732.514, F.S., regarding vesting of devises.

Section 48 amends s. 732.515, F.S., regarding separate writing identifying devises of tangible property, to provide that the written statement or the list must be referred to in the will. Under current law, such statements or lists do not affect the validity of the will even if the statement or list is subsequently changed or amended.²⁷ This section also clarifies that the supplemental list, however, may not be used to dispose of property used in trade or business.²⁸ Provisions in the last effective writing shall govern in situations where there are conflicts among multiple effective writings.

²⁶ Under the form, a testator and witnesses are to be sworn just as a witness is required to be sworn in a court hearing. Bill proponents state that the formal procedure is “awkward to comply with”, and that most attorneys conducting a will signing ceremony follow the simpler rules for taking an acknowledgment. *See* Probate Code Committee Comments (9/17/2000).

²⁷ Without this statute, any writing declaring testamentary intent may possibly be construed to be a revocation of a previous will, even though the intent was merely to supplement the will without the formality and cost of drafting an entire new will. Persons wishing to distribute heirlooms and items of sentimental value to the family commonly use this provision.

²⁸ This change “clarifies that mention of the separate writing in the will is essential and not merely permissive. The permissive mischief arises from the frequent use of the word ‘may’ which is deleted” *See* Probate Code Committee Comments (9/17/2000).

Part VI of Chapter 732, F.S.
Rules of Construction

Sections 49 and 50 amend s. 732.6005, F.S., relating to rules of construction and intention, and s. 732.601, F.S., relating to simultaneous death law, to make grammatical and stylistic changes.

Section 51 amends s. 732.603, F.S., regarding antilapse; deceased devisee; class gifts.

Present Situation: When a will devises property to a person, and that person is not alive at the time of the decedent's death, then that person cannot receive the property and the property is said to have lapsed. When a devise lapses, the property becomes part of the residuary estate, and the testator's intent for the devise may be thwarted. While good drafting of wills avoids this result, many wills are poorly drafted and even the best of drafting may not be able to account for all the possible changes that may occur in the many years between will drafting and death. Section 732.603, F.S., provides that a lapsed devise to a grandparent of the decedent, or to a lineal descendent of a grandparent of the decedent, will not lapse but is to be distributed to lineal descendants per stirpes. It is not clear whether this section applies to testamentary trusts.

Effect of Proposed Changes: It expands the antilapse provisions to apply to testamentary trusts. Additional grammatical and stylistic changes are made.

Section 52 amends s. 732.604, F.S., regarding failure of testamentary provision, to make grammatical and stylistic changes only.

Section 53 amends s. 732.605, F.S., regarding change in securities; accessions; nonademption.

Present Situation: If a will provides that a beneficiary is to receive specific securities rather than their cash value, the beneficiary is only entitled to: a) As much of the devised securities as are in the estate, b) Any additional securities of the same entity owned by the testator because of action initiated by the entity (excluding any acquired by the exercise of purchase options), and c) Securities of another entity owned by the testator as a result of merger, consolidation, reorganization, or other similar action initiated by the entity. Distributions before death are not included in the specific devise.²⁹

Effect of Proposed Changes: It expands the list of securities to which a beneficiary is entitled (if a devise is other than for their cash value) to include securities of the same entity acquired as a result of a re-investment plan. Further, specifies that both cash and non-cash distributions before death are not added to a specific devise of securities.

Section 54 amends s. 732.606, F.S., regarding nonademption of specific devises in certain cases; sale by guardian of the property; unpaid proceeds of sale, condemnation, or insurance.

²⁹ For example, a dividend declared before death is property of the estate, not the beneficiary.

Present Situation: A testator may provide in a will for the specific devise of property.³⁰ Normally, if the decedent no longer owns the specifically devised property at the time of death, the bequest simply fails. If a guardianship proceeding is instituted against an individual, the guardian may sell property of the ward even though the ward may have kept that property so that it could be specifically devised at death. Section 732.606, F.S., provides that, if a guardianship sells specifically devised property for the care and maintenance of the ward, the intended beneficiary is entitled to the net proceeds. This section does not apply if the testator was restored to capacity at least one year before death.

Effect of Proposed Change: It removes the limitation that the sale must have been for the care or maintenance of the ward. Thus, s. 732.606, F.S., will be applicable to all sales by a guardian regardless of the circumstances of the sale.

Part VII of Chapter 732, F.S. Contractual Arrangements Relating to Death

Section 55 amends s. 732.701, F.S., regarding agreements concerning succession.

Present Situation: The phrase “agreements concerning succession” refers to an agreement to make a will, to give a devise, not to revoke a will, not to revoke a devise, not to make a will, or not to make a devise. Agreements concerning succession are found in many forms, most notably in premarital, separation, and divorce agreements. An agreement concerning succession must be in writing and signed in the presence of two witnesses to be enforceable.

Effect of Proposed Changes: It provides for full faith and credit of a succession agreement in a Florida probate proceeding if the agreement was valid under the laws of the state or country when and where executed.

Section 56 amends s. 732.702, F.S., regarding waiver of spousal rights.

Present Situation: A spouse may agree to waive some or all statutory rights to a surviving spouse’s share of an estate. These agreements may be entered into at any time, although they are most commonly found in premarital agreements. Any or all of these rights may be partly or wholly waived by written agreement. Unlike wills and agreements concerning succession, a waiver does not require the formalities of a will (namely that there be two subscribing witnesses).

Effect of Proposed Changes: It imposes formality requirements so that waivers of statutory rights to a surviving spouse’s share of an estate must be in writing and signed in the presence of two subscribing witnesses. Additionally, it provides that a waiver of spousal rights executed in another jurisdiction is valid in Florida if executed under the applicable laws of that jurisdiction.

³⁰ A specific devise is a statement that a particular item is to be given to a particular person. It is the opposite of a general devise. For example, a devise of \$500 is a general devise. A specific devise would be “I direct the personal representative to give my china and silver to my daughter Mary Smith.”

**Part VIII of Chapter 732, F.S.
General Provisions**

Section 57 amends s. 732.801, F.S., regarding disclaimer of interests in property passing by will or intestate succession or under certain powers of appointment.

Present Situation: A person who is entitled to receive property from an estate may disclaim the property, in which case the property is distributed as if the disclaiming person had predeceased the testator. An insolvent person may not exercise the right of disclaimer if the person is insolvent at the time that the right to the property vests.

Effect of Proposed Changes: It changes the time of determining insolvency for purposes of the limitation on disclaimer by insolvent persons from the time that the interest vests to the time that the disclaimer is recorded. Also, grammar and style changes are made.

Section 58 amends s. 732.804, F.S., regarding provisions relating to disposition of the body.

Present Situation: A personal representative ordering cremation of the decedent's body, and a person providing cremation services, who acts in accordance with a provision in a will or any written contract expressing a desire for cremation, is not civilly liable for the ordering or carrying out of a cremation.

Effect of Proposed Changes: Before letters of administration are issued, any person may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements. In addition, a person may provide written direction as to his or her cremation. The change to "any person may carry out written instructions of the decedent" expands the class of persons who may be insulated from liability, and the insulation from liability is extended beyond cremation to include all funeral and burial arrangements.

**Part IX of Chapter 732, F.S.
Production of Wills**

Section 59 amends s. 732.901, F.S., regarding production of wills, to change grammar and style.

**Part X of Chapter 732, F.S.
Anatomical Gifts**

Sections 60-75 transfer the provisions of Part X, relating to anatomical gifts, in its entirety and unchanged to chapter 765, F.S., relating to Health Care Advance Directives. The provisions in ss. 732.910 -732.922, F.S., are renumbered to correspond to ss. 765.510 -765.522, F.S.

Chapter 733, F.S.
Administration of Estates

Part I of Chapter 733, F.S.: General Provisions

Sections 76 and 77 amend s. 733.101, F.S., relating to venue of probate proceedings, and s. 733.103, F.S., relating to the effect of probate, respectively, to make grammatical and stylistic changes only.

Section 78 amends s. 733.104, F.S., relating to the suspension of statutes of limitation in favor of the personal representative.

Present Situation: If a person entitled to bring a cause of action dies before the expiration of an applicable statute of limitations period, the personal representative may commence the cause of action “after the expiration and within 12 months from the date of the decedent’s death.” Defendants in lawsuits where the plaintiff is an estate have tried to argue that this clause shortens all applicable statutes of limitation for causes of action owned by an estate to 12 months from the date of death.³¹

Effect of Proposed Changes: It clarifies that a cause of action can be filed up to 12 months after the decedent’s death or up until the expiration of the statute of limitations for such action whichever is later.

Section 79 amends s. 733.105, F.S., regarding determination of beneficiaries.

Present Situation: The personal representative or any other interested person (when necessary) may file a petition seeking a determination of the heirs or devisees or their shares of an estate. The procedures for the petition are set forth.

Effect of Proposed Changes: It deletes the statutory procedural aspects which are already contained in Fla. Prob. R. 5.025 (adversary proceedings and notice requirements) and R. 5.385 (determination of beneficiaries). The substantive right of all interested persons including the personal representative, to file a petition to determine beneficiaries remains. Also, grammar and style changes are made.

Section 80 amends s. 733.106, F.S., regarding costs and attorney fees.

Present Situation: Any person designated as the personal representative of the last known will, or alternatively any proponent of the will (if the personal representative fails to act within a reasonable time) is entitled to reimbursement of costs and attorney’s fees from the estate. The person must have acted in good faith in offering the will for probate. Any attorney

³¹ *Mackle v. Mackle*, 389 So.2d 1081 (3rd DCA 1980) (ruling that statute does not create a blanket 12 month statute of limitations).

rendering services to the estate can apply for an attorney's fees order which shall be granted after notice to the personal representative and all other interested persons.

Effect of Proposed Changes: It eliminates the requirement that the offered will must be the "last known" will. Thus, a person offering *any* will to probate who acts in good faith will be entitled to reimbursement.³² Also, it provides that any attorney who has rendered services to an estate may be awarded reasonable compensation from the estate and eliminates the notice pre-requisite.

Section 81 amends s. 733.107, F.S., regarding burden of proof in contests, to make a grammatical change only.

Section 82 amends s. 733.109, F.S., regarding revocation of probate.

Present Situation: A proceeding to revoke probate must be filed in the court where the will was admitted to probate. The procedures for revocation of probate are set forth in statute and rules. Formal notice of petition requires service upon the personal representative and all interested persons.

Effect of Proposed Changes: It provides that a proceeding to revoke probate is to be filed in the court having jurisdiction over the administration. It removes procedural provisions already contained in Fla. Prob. R. 5.270 (revocation of probate) and R. 5.025 (adversary proceedings and notice requirements). Although the statutes define "interested persons" as including a personal representative, this definition is not contained in the rules although the committee notes for Fla. Prob. R. 5.25 qualify a personal representative as an interested person for purpose of all adversary proceedings. It also clarifies that title to property purchased in good faith prior to an order of revocation will not be affected by the revocation of probate of a will. Grammatical and stylistic changes are also made.

Part II of Chapter 733, F.S. Commencing Administration

Section 83 amends s. 733.201, F.S., relating to proof of wills, to change grammar and style.

Section 84 amends s. 733.202, F.S., regarding a petition for administration of an estate.

Present Situation: Any interested person may file a petition for administration of an estate. The contents of the petition are detailed.

Effect of Proposed Changes: It deletes procedural provisions already contained in Fla. Prob. R. 5.200 (petition for administration) relating to the requisite content of a petition for administration, leaving only the substantive right to file such petition in statute.

³² In *Furlong v. Raimi*, 735 So.2d 583 (Fla. 3rd DCA 1999), a successful proponent of an earlier will was denied reimbursement for attorney's fees because of the limitation on who is entitled to reimbursement found in s. 733.106(2), F.S. This change alters the continuing precedential value of the *Furlong* case.

Section 85 repeals s. 733.203, F.S., relating to notice requirements, as procedural in nature and already contained in Fla. Prob. R. 5.260(f)(caveat proceedings), and Fla. Prob. R. 5.201 (notice of petition for administration). Section 733.203(1), F.S., provides for the required notice procedure if a caveat has been filed by an heir or a devisee under a will other than that being offered for probate. Section 733.203(2), F.S., provides that no notice need be given of the petition for administration or of the order granting letters when it appears that the petitioner is entitled to preference of appointment; but that before letters are granted to any person who is not entitled to preference, formal notice must be served on all known persons qualified to act as personal representative and entitled to preference equal to or greater than the applicant, unless those entitled to preference waive the right in writing.

Section 86 amends s. 733.204, F.S., regarding probate of a will written in a foreign language.

Present Situation: In admitting a will to probate, a court must establish the correct English translation. If the original will is not or cannot be filed, a photographic copy of the original will must be filed. At any time during the administration any interested person may have the correctness of the translation of the will, or any part, re-determined after formal notice to all other interested persons.

Effect of Proposed Changes: It deletes procedural portions of s. 733.204(2), F.S., which are already contained in Fla. Prob. R. 5.210 (probate of will) and which automatically provide for a court determination of such will's correctness. Also, it changes grammar and style.

Sections 87 and 88 amend s. 733.205, F.S., regarding probate of notarial will, and s. 733.206, F.S., relating to in-state probate of a will probated erroneously in another state or country. Only grammatical and stylistic changes are made.

Section 89 amends s. 733.207, F.S., relating to the establishment and probate of a lost or destroyed will. It deletes the procedural portions which are already contained in Fla. Prob. R. 5.025 (adversary proceeding) and Fla. Prob. R. 5.510 (establishment and probate of late and destroyed wills). It also makes grammatical and stylistic changes.

Section 90 amends s. 733.208, F.S., regarding discovery of later will.

Present Situation: A later written will, if otherwise valid, is considered a revocation of the earlier will. A later will for probate may be offered by any interested person.

Effect of Proposed Changes: It deletes procedural portions which are already contained in Fla. Prob. R. 5.270 (revocation of probate) and R. 5.210 (probate of will). Grammatical and stylistic changes are also made.

Section 91 amends s. 733.209, F.S., regarding estates of missing persons, to change grammar and style.

Section 92 amends s.733.212, F.S., regarding notice of administration and the filing of objections.

Present Situation: Section 733.212, F.S., requires a personal representative to prepare a notice of administration with specified content requirements. The notice must be published once weekly for two weeks and served on the spouse, beneficiaries, and creditors of the estate and trustee. This section has reportedly caused confusion and many problems in recent years. The format was initially designed to give notice to beneficiaries of the estate, and thus it is confusing when served upon creditors. The failure to give notice of a pending estate proceeding to a creditor is considered one of the most significant estate problems.

Effect of Proposed Changes: It deletes the procedural portions from s. 733.212, F.S., which are contained in Fla. Prob. R. 5.240 (notice of administration). It deletes the publication requirement and removes provisions governing notice and service thereof of administration to creditors which will be addressed in s. 733.2121, F.S. It broadens the list of persons to be served notice to include those persons who may be entitled to exempt property and on any other person who may claim an interest in the estate. This provision now conflicts with the corresponding court rule. It additionally requires that a notice of administration identify the date of any will or codicil that has been offered for probate.

Section 93 creates s.733.2121, F.S., regarding notice to creditors and filing of claims.

Present Situation: The personal representative must conduct a diligent search to determine a decedent's creditors' names and addresses. *See* s.733.212, F.S. The personal representative must also serve a copy of the notice of administration upon such creditors. Due process requires "actual notice to known or reasonably ascertainable creditors" of a decedent of a pending probate case regarding that decedent in order to bar claims. *See Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988). The Agency for Health Care Administration is considered a reasonably ascertainable creditor if the decedent, 55 years or older, had received Medicaid benefits and was survived by a spouse; by a child or children under 21 years of age; or by a child or children who are blind or permanently and totally disabled pursuant to the eligibility requirements of Title XIX of the Social Security Act. Section 409.9101(6), F.S.³³

Effect of Proposed Changes: This section creates provisions, including a form for Notice to Creditors. This Notice to Creditors is now in lieu of the Notice of Administration. The Notice to Creditors is published once a week for two consecutive weeks. A copy of the Notice to Creditors must be furnished to known or reasonably ascertainable creditors and contingent creditors. A personal representative is not personally liable for wrongfully furnishing, or failing to furnish, a notice to creditors, as long as it is done in good faith notice requirements regarding Medicaid recipients to provide that The personal representative must provide a copy of the notice to creditors on the AHCA if the decedent was 55 years of age or older at the time of death.

³³ A claim under s. 409.9101, F.S., may not be enforced by AHCA if the recipient is survived by a spouse; a child or children under 21 years of age; or a child or children who are blind or permanently and totally disabled pursuant to the eligibility requirements of Title XIX of the Social Security Act. Section 409.9101(6), F.S.,

Sections 94 and 95 amend, respectively, s. 733.2123, F.S., relating to adjudication before the issuance of letters, and s. 733.213, F.S., relating to probate as a prerequisite to judicial construction of will, to change grammar and style.

Part III of Chapter 733, F.S.
Priority to Administer and Qualifications of Personal Representative

Sections 96, 97, and 98 amend respectively s. 733.301, F.S. (preference in appointment of personal representative), s. 733.302, F.S. (who may be appointed personal representative), and s. 733.305, F.S. (trust companies and other corporations and associations). Only grammatical and stylistic changes are made.

Section 99 amends s. 733.306, F.S., regarding effect of appointment of a debtor.

Present Situation: The appointment of a debtor as personal representative of an estate does not extinguish the debt due to the decedent unless released by a specific provision in the testator's will.

Effect of Proposed Changes: It deletes a superfluous provision that a testator may release a debt by will. Also, grammar and style changes are made.

Sections 100, 101, and 102 amend, respectively, s. 733.307, F.S., regarding succession of administration, and s. 733.308, F.S., regarding administrator ad litem, and s. 733.309, F.S., regarding executor de son tort (i.e., without authority or lawful warrant). Only grammatical and stylistic changes are made.

Section 103 creates s. 733.310, F.S., relating to the nonqualification of a personal representative.

Present Situation: There is no duty for a personal representative to inform the court or interested parties that he or she is no longer qualified to act as a personal representative by virtue of some event such as a felony conviction or appointment of a guardian of the person.

Effect of Proposed Changes: It imposes a new duty on personal representatives to inform the court and interested parties at any time the personal representative believes or should believe that he or she is no longer qualified to be appointed as a personal representative. The notice must state the reason why. A personal representative who fails to comply with this requirement may be personally liable for costs and attorneys' fees incurred in any subsequent proceeding to remove that person as personal representative.

Part IV of Chapter 733, F.S.
Appointment of Personal Representative; Bonds

Section 104 repeals s. 733.401, F.S., relating to the procedures for issuance of letters of administration. These provisions are already contained in Fla. Prob. R. 5.235 (issuance of

letters). The provision regarding the clerk's approval of a bond with the imposition of a fee is relocated to s. 733.402, F.S., as revised by this bill.

Sections 105 and 106 amend respectively, ss. 733.402, F.S. and 733.403, F.S., relating to required bonds and bond amounts.

Present Situation: Every person to whom letters of administration are granted must post a bond, unless the bond requirement is waived by the will or by the court. The clerk of the court must approve of the bond. The court sets the amount of the bond based on a consideration of the gross value of the estate, the relationship of the personal representative to the beneficiaries, exempt property and any family allowance, the type and nature of assets, and liens and encumbrances on the assets. The court may also waive the bond requirement, require a personal representative or curator to give a bond, increase or decrease the bond amount, or require additional security.

Effect of Proposed Changes: It conforms the waiver of bond provision formerly in s. 733.403(2), F.S., with the waiver of bond provision in Fla. Prob. R. 5.235 and relocates the provision into a new subsection (4) in s. 733.402(2), F.S. It places provisions formerly in s. 733.401, F.S., relating to the waiver of clerk's service charges for approving bonds in s. 733.402, F.S. It adds "consideration of known creditors" to the list of factors for the court to consider in determining a bond amount. Section 733.403, F.S., additionally requires the court to consider the known creditors when determining the bond amount. Also, it changes grammar and style.

Section 107 amends s. 733.404, F.S., relating to liability of surety, to change grammar and style..

Section 108 amends s. 733.405, F.S., regarding release of surety.

Present Situation: The surety for a bond posted by a personal representative or curator has the right to cancel the surety contract and seek a release from further liability.³⁴ The probate court must release the surety and order the personal representative or curator to post a new bond; and if the personal representative or curator is unable to post a new bond, the personal representative or curator will be immediately removed from office. The surety is liable for all acts or omissions of the personal representative or fiduciary up to the time that a new bond is posted.

Effect of Proposed Changes: It makes conforming changes by replacing the terms "personal representative" and "curator" with the more all inclusive term "fiduciary" to make all such provisions applicable to all persons who are subject to bond requirements under the Florida Probate Code, no matter in what capacity.³⁵ Also, grammar and style changes are made.

³⁴ For instance, a surety that discovers a theft or mismanagement by the personal representative would typically seek to withdraw the surety in order to minimize the potential for future loss. Such a motion would usually, in practice, lead to removal of the personal representative.

³⁵ For instance, a trustee of a testamentary trust may have posted a bond.

Section 109 amends s. 733.406, F.S., regarding bond premium allowable as expense of administration.

Present Situation: Specified persons who posts a bond may charge the estate for the reasonable cost of the bond; although the chargeable cost is limited to 1% of the face amount of the bond. Reportedly, surety companies have become increasingly reluctant to issue bonds under the fee cap.³⁶

Effect of Proposed Changes: It eliminates the 1% limitation cap. The all inclusive term “fiduciary” and personal representative is used to refer to those persons who must pay a reasonable premium for a bond. This bond premium will be considered an automatic part of the expense of administration. It also changes grammar and style.

Part V of Chapter 733, F.S. Curators; Successor Personal Representatives; Removal

Section 110 amends s. 733.501, F.S., relating to curators.

Present Situation: A curator is “a person appointed by the court to take charge of the estate of a decedent until letters are issued.”³⁷ The curator acts as a short term personal representative in an interim period when a personal representative cannot be appointed. Section 733.501, F.S., provides the procedures for appointment of a curator. It only requires formal notice of a curator’s future appointment to a person entitled to letters of administration when that person is residing in the county where the property is located. An exception is made if the property is in danger of waste, destruction or removal and the curator’s appointment would be delayed by the notice.

Effect of Proposed Changes: It removes the procedural portions relating to issuance of letters of curatorship, transfer of decedent’s effects to curator by court direction, and inventory requirements which are already contained in Fla. Prob. R. 5.122 (curator). It expands the formal notice requirement prior to a curator’s appointment to apply in all cases regardless of whether or not the person entitled to letters of administration resides in the county where the property is located. Provisions relating to the exception to the formal notice requirement and the extent of the curator’s authority as acting personal representative remain unchanged by the bill. It adds two new provisions not currently or expressly dealt with in statute: 1) removal and surcharge provisions applicable to personal representatives are also applicable to curators; and 2) personal representative fee provisions in s. 733.617, F.S., are applicable to curators.

Section 111 amends s. 733.502, F.S., regarding resignation of personal representative.

Present Situation: A personal representative may resign subject to court acceptance and only after the court receives a final accounting (including all books and papers and all assets) from

³⁶ This section has been considered probably one of the most archaic and out of date section in the Probate Code. See Probate Code Committee Comments (9/17/2000).

³⁷ Section 731.201(7), F.S.

the personal representative. After resignation, a personal representative remains liable for all actions taken prior to the time that the resignation is accepted by the court.

Effect of Proposed Changes: It deletes the final accounting provisions which are already contained in Fla. Prob. R. 5.430(a). It also removes the surrender of assets provisions which is expanded and contained in the new s. 733.5036, F.S. It conditions the court's acceptance of the resignation and revocation of the letters of personal representative upon there being no jeopardy to the interests of the estate.

Section 112 amends s. 733.503, F.S., regarding appointment of successor upon resignation.

Present Situation: Unless there is a joint personal representative, the resignation of a personal representative may not be accepted until there is a replacement personal representative.

Effect of Proposed Changes: It eliminates the successor exception when there is a joint personal representative,³⁸ and generally provides that upon acceptance of the personal representative's resignation, the court must appoint a successor personal representative or a curator until a successor personal representative is appointed. It is unknown whether this revision is intended to require the appointment of a successor personal representative regardless of whether one or more remaining personal representatives exist in a joint personal representative situation.

Section 113 creates s. 733.5035, F.S., regarding surrender of assets after resignation.

Present Situation: Currently, a resigning personal representative must turn over all estate property to the successor personal representative prior to being relieved of his or her duties and obligations. *See* s. 733.502, F.S.

Effect of Proposed Changes: It expands the provision governing surrender of assets after resignation. Immediately upon the court's acceptance of the resigning personal representative's resignation, he or she is required to turn over to the successor fiduciary all estate assets, records, documents, papers, and other property of or concerning the estate. However, the court may establish the conditions, the specificity and timing of the turnover to allow for the resigning personal representative to fulfill his or her obligations as to the final accounting which is subject to court approval.³⁹

Section 114 creates s. 733.5036, F.S., regarding accounting and discharge following resignation.

Present Situation: Current law and the Florida Probate Rules require a resigning personal representative to submit a final accounting before he or she may be relieved of duties and

³⁸ Joint personal representatives are additionally governed by s. 733.615 and 733.616, F.S., relating to actions and powers of joint or surviving personal representatives.

³⁹ This revision attempts to correct the sequence of events arising from the resignation of a personal representative to the appointment of a successor personal representative and to ensure the uninterrupted administration of the estate pending this transition. According to Fla. Prob. R. 5.440, when there is a removal of the personal representative, all the estate records and property must be delivered to the remaining or successor personal representative within 30 days after removal or less time set by the court.

obligations. See s. 733.502, F.S. and Fla. Prob. R. 5.430. Neither the code nor the rules address when or how a resigning personal representative is to be compensated for services rendered.

Effect of Proposed Changes: The new section 733.5036, F.S., contains an expanded version of the final accounting requirement. A resigning personal representative must file and serve a final accounting. It does not say to whom. The personal representative is to be discharged, the bond released and the surety discharged after: 1) a determination and satisfaction of any liability of the personal representative, 2) after compensation of the personal representative and the attorney and other persons employed by the personal representative, and 3) after receipt of evidence that undistributed estate assets have been delivered to the successor fiduciary.

Section 1115 amends s. 733.504, F.S., regarding causes for removal of a personal representative. In addition to grammatical and stylistic changes, it adds that a personal representative's subsequent disqualification at any time is grounds for removal.

Section 116 amends s. 733.505, F.S., regarding jurisdiction in removal proceedings.

Present Situation: The court that issued the letters of administration hears a petition for removal of a personal representative.

Effect of Proposed Changes: It ensures that the court with jurisdiction over the decedent's estate is the same court that must hear a petition for removal of a personal representative.⁴⁰ This is now in conflict with court rules which require a petition for removal to be filed in the court issuing the letters. See Fla. Prob. R. 5.440(a).

Section 117 amends s. 733.506, F.S., regarding proceedings for removal.

Present Situation: Any interested person may file a petition for removal of a personal representative. The Probate Code does not specifically require that letters of administration be revoked, and is not specific as to when discharge of a removed personal representative occurs.

Effect of Proposed Changes: It expressly requires the court to revoke the letters of administration previously issued to a removed personal representative. It further specifies that the removal of the personal representative does not exonerate the personal representative or his or her surety from any legal liability.

Section 118 creates s. 733.5061, F.S., regarding appointment of successor upon removal.

Present Situation: Section 733.507, F.S., requires the court to appoint a successor personal representative upon removal of a sole personal representative.

Effect of Proposed Changes: It provides that the court must appoint a successor personal representative, or a curator to serve until a successor personal representative is appointed, when a personal representative is removed.

⁴⁰ In the majority of probate cases, the court that issues letters of administration is the court that has jurisdiction over the estate of the decedent.

Section 119 repeals s. 733.507, F.S., relating to the appointment of a successor personal representative and administration following resignation or removal of a personal representative. Section 733.507, F.S., currently provides a successor personal representative must be appointed to complete the administration of an estate after a personal representative resigns or is removed. No successor personal representative need be appointed if a surviving joint personal representative is available. The bill provides a new process for the appointment of a successor personal representative in the event of resignation or removal. *See* s. 733.503, F.S. and s. 733.5061, F.S.

Section 120 amends s. 733.508, F.S., regarding accounting and discharge upon removal.

Present Situation: A removed personal representative must file a final accounting within 30 days after removal. The Probate Code does not specify the manner and timing for compensation of a removed personal representative for services rendered prior to removal.

Effect of Proposed Changes: It adds service requirements for final accounting but it does not specify to whom. It removes the 30-day procedural requirement to file a final accounting which is already contained in Fla. Prob. R. 5.440 (proceedings for removal). Upon satisfaction of a removed personal representative's duties, compensation of such person and his or her attorney and other employed persons, and upon confirmation of transferred assets, the personal representative is to be discharged, the bond released and the surety discharged.⁴¹

Section 121 amends s. 733.509, F.S., regarding surrender of assets upon removal.

Present Situation: A removed personal representative has 30 days to deliver to the remaining or successor personal representative all the decedent's property, records and documents.

Effect of Proposed Changes: It revises the timing for surrender of the assets to occur immediately in lieu of 30 days following the order of removal. This now conflicts with Fla. Prob. R. 5.440(c) which allows up to 30 days as did the existing statutory provision.

Part VI of Chapter 733, F.S. Duties and Powers of Personal Representative

Section 122 amends s. 733.601, F.S., regarding time of accrual of duties and powers.

Present Situation: A personal representative's duties and powers begin upon appointment although prior acts beneficial to the estate and occurring prior to the appointment may be ratified by the personal representative's appointment. Prior to the issuance of letters, the executor of the will can carry out written funeral and burial instructions.

⁴¹ The amended statute does not require payment of fees to a discharged personal representative, it merely provides that the fees, if earned, are payable. The court will, as in current law, have the discretion to deny payment of any fees to a personal representative removed for cause.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, it removes the provision governing funeral and burial instructions which is subsequently relocated to s. 734.804, F.S.

Sections 123 and 124 amends respectively s. 733.602, F.S., regarding duties of a personal representative, and s. 733.603, F.S., regarding the actions of a personal representative without court order. It makes grammatical and stylistic changes only.

Section 125 amends s. 733.604, F.S., regarding inventory.

Present Situation: A verified inventory (a list of the assets of the estate) must be filed within 60 days of the issuance of letters of administration. It provides for the opening and inventory process of a safe-deposit box. Service of the inventory and the amended or supplementary inventory must be made to the Department of Revenue, the surviving spouse, heir at law (intestate estate), residuary beneficiary (testate estate), any other interested person who may request it.⁴² Upon subsequent discovery of other assets, the personal representative must file a verified amended or supplementary inventory. A beneficiary or heir at law must be provided upon written request specific information including valuation as to the certain asset under specified circumstances.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, it deletes the 60-day procedural requirement which is already contained in Fla. Prob. R. 5.340. It also deletes the service requirements as procedural and already contained in the same probate rule. It removes the provision governing the safe-deposit box inventory process which is subsequently moved to s. 733.6065, F.S., as created by this bill, and duplicated into s. 655.936(4), F.S. (relating to financial institution obligations). It requires the personal representative to provide a beneficiary, upon written request, a written explanation of how the inventory value of an asset was determined or a copy of the appraisal. These provisions are different from those in Fla. Prob. R. 5.340(e). The rule requires a personal representative to provide information about the estate, review, and inspection of appraisals which require the personal representative to provide any interested person, upon written request, with information about the estate and review and inspection of appraisals.

Section 126 repeals s. 733.605, F.S., regarding a personal representative's authority to employ an appraiser to ascertain the value of any asset. The authority to hire an appraiser is moved to s. 733.612(19), F.S., relating to the broad authority of a personal representative to act without prior court approval or order or unless otherwise limited by the will.

Section 127 creates s. 733.6065, F.S., regarding opening safe-deposit box.

Present Situation: The initial opening of a safe-deposit box is governed by s. 733.604(1)(b), F.S., and s. 655.936, F.S. The initial opening and inventory of the box, must be conducted in the presence of the financial institution's employee and the personal representative, each of

⁴² Fla. Prob. R. 5.340(d), requires that service of the inventory upon any interested person if the request was made in writing.

whom must verify the contents of the box by signing a copy of the inventory. The personal representative must file the inventory with the court within 10 days after the box is opened.

Effect of Proposed Changes: It expands the relocated provision regarding the initial opening and inventory of safe-deposit boxes. The initial opening of a decedent's safe-deposit box must be conducted by any two of the following: an employee of the financial institution, the personal representative, or the personal representative's attorney of record. The two persons who open the box must inventory the contents. The personal representative must file, in addition to the inventory, a copy of the financial institution's box entry record including the time period from 6 months prior to death through the date of inventory. The 10-day period for filing remains unchanged. It further authorizes removal of the box contents by the personal representative.⁴³ Rights under this section are cumulative to rights under s. 655.935, F.S., relating to the right to open and examine the contents of a safe-deposit box.

Section 128 amends s. 733.607, F.S., regarding a personal representative's right to take possession or control of a decedent's estate under specified circumstances. In addition to grammatical and stylistic changes, it clarifies that excepted homestead property must be protected homestead property. It also expands the category of payable items for which a charge may be made against a revocable trust, to include "obligations" of the estate thus including items such as funeral expenses, debts and taxes with preference under federal law, and family allowance.

Section 129 amends s. 733.608, F.S., relating to the general power of a personal representative.

Present Situation: All real and personal property and income or rent flowing from it are considered assets to be used for the payment of devises, family allowance, debts, estate and other specified obligations and administration of the estate, and for the enforcement of contribution and advancements.

Effect of Proposed Changes: It expands the class of obligations to include "elective share" against which assets must be paid by the personal representative from the estate. It also adds a new subsection relating to the power of a personal representative to take possession of protected homestead property under specified circumstances which is not otherwise permitted under s. 733.607, F.S. The personal representative has discretionary authority to take possession of the protected homestead property if it reasonably appears to him or her that the person who is in possession of such property does not have interest in the property. The possession is for the limited purpose of preserving, insuring and protecting it for the heir or devisee, pending a final determination of the homestead status. The personal representative has no duty to rent or otherwise make the property productive although he or she may collect rent and revenue for the heir or beneficiary. It does not address what avenues for objection are available to such person if the personal representative does take possession of the property pending a determination of protected homestead status.

⁴³ Banks, not infrequently, now require a court order to inventory a safe deposit box, even in the face of unrestricted letters. Also, some banks now charge a fee for the attendance of their employee. These amendments are intended to facilitate estate administration and to curb fraudulent activities against beneficiaries, creditors and taxing authorities involving disappearance of safe deposit box assets and contents. *See* Probate Code Committee Comments (9/17/2000).

Section 130 amends s. 733.609, F.S., regarding improper exercise of power and breach of fiduciary duty by a personal representative.

Present Situation: If the personal representative exercises power in an improper manner or in bad faith, he or she is liable to the interested person. The prevailing party in any litigation regarding improper exercise of power by a personal representative must be awarded costs and attorney's fees.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, it revises the standard of liability for the personal representative. The personal representative is now liable for breach of fiduciary duty in the same way a trustee would be liable for breach of fiduciary duty governing an express trust. The personal representative is liable to interested persons for damage or loss resulting from that breach. The effect of this change is that a personal representative will be liable for a failure to act in addition to being liable for wrongful actions.

Sections 131 and 132 amend, respectively, s. 733.610, F.S., regarding sale, encumbrance or transaction involving conflict of interest, and s. 733.611, F.S., regarding persons dealing with the personal representative. Only grammatical and stylistic changes are made.

Section 133 amends s. 733.612, F.S., regarding transactions authorized for the personal representative; exceptions.

Present Situation: Section 733.612, F.S., lists 27 specific powers of a personal representative. In particular, a personal representative can deposit or invest assets of the estate provided the funds are not needed to satisfy debts and expenses and are not immediately distributable. The assets may be placed in federally insured interest-bearing accounts, readily marketable secured loan arrangements, or other prudent investments that would be reasonable for use by trustees.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, this section revises the manner in which the personal representative may exercise the power to invest in subsection (4). It is replaced with a reference to the "Prudent Investor Rule" as contained in ss. 518.10 - .14, F.S., relating to investment of fiduciary funds. The Prudent Investor Rule provides guidelines to fiduciaries regarding what kinds of investments are appropriate for such fiduciaries to utilize when investing funds belonging to a beneficiary. A fiduciary that invests funds in compliance with the Prudent Investor Rule is generally not liable to the beneficiary for any loss in the value of the fund, nor is the fiduciary liable to the beneficiary because a different investment would have yielded a higher return. The personal representative must still consider the amount to be invested, liquidity needs of the estate, and the timing of distribution in making the investment.

It also adds "appraisers" to the list of persons the personal representative may employ. The personal representative previously had this authority in another provision of existing law.

Section 134 amends s. 733.6121, F.S., regarding the relationship between the powers of a personal representative and laws relating to environmental or human health.

Present Situation: Section 733.6121, F.S., sets forth the duties and obligations of a personal representative regarding property of the estate that is or may be contaminated with hazardous or toxic substances. Subsection (7) provides that s. 733.6121, F.S., applies to any estate admitted to probate on or after July 1, 1995.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, it qualifies what costs may be charged against the estate asset. The cost of any inspection, investigation, review, abatement, response, cleanup, or remedial action must be considered *reasonable* by the personal representative.

Section 135 amends s. 733.613, F.S., regarding personal representative's right to sell real property.

Present Situation: A personal representative may sell real property of the estate. If the will does not give a specific power of sale, or if the decedent dies intestate, the sale must be authorized by, or confirmed by, the court. The content of the petition for authorization or confirmation of sale is specified. Title insurance companies generally require that the claims period expire (90 days after the notice of administration is first published) before they will allow a title insurance policy to issue without exception for the rights of creditors.

Effect of Proposed Changes: It removes the procedural aspects of this section which are already contained in Fla. Prob. R. 5.040 (notice), Fla. Prob. R. 5.330(execution by personal representative), Fla. Prob. R. 5.370 (sale of real property when no power conferred), and Fla. Prob. R. 5.041(service). It adds a subsection (3), which allows a purchaser or lender to take title to real property free of creditors' claims and beneficiaries' entitlements against the estate provided the sale or mortgage occurred under a specific power or court order authorization to sell or mortgage the real property.⁴⁴ Existing mortgages and other liens, however, are not affected.

Sections 136 and 137 amend, respectively, s. 733.614, F.S., regarding powers and duties of successor personal representative, and s. 733.615, F.S., regarding action by joint personal representatives. Only grammatical and stylistic changes are made.

Section 138 amends s. 733.616, F.S., regarding powers of surviving personal representatives.

Present Situation: Unless limited by the terms of a will, a remaining or surviving personal representative may exercise the powers previously exercisable by the joint personal representatives before termination of the appointment of one or more personal representatives. Presumably termination of the appointment refers to removal or resignation.

Effect of changes: It provides that the powers of a remaining or surviving personal representative may be limited by court order.

Section 139 amends s. 733.617, F.S., regarding compensation of personal representative.

⁴⁴See *Anderson v. Johnson*, 732 So.2d 423 (Fla. 5th DCA 1999)

Present Situation: A personal representative is entitled to a commission or fee for acting as personal representative. The commission is based on a sliding scale percentage of the value of the estate plus the total earnings of the estate. A personal representative is entitled to an additional fee for special services rendered to the estate. The commission is automatically payable unless objected to by an interested party, but a fee for extraordinary services must be applied for and granted by the court.⁴⁵

Effect of Proposed Changes: In addition to grammatical and stylistic changes, it adds “dealing with protected homestead” property as a type of extraordinary service for which a personal representative may receive additional compensation.

Section 140 amends s. 733.6171, F.S., regarding compensation for the personal representative’s attorney.

Present Situation: The attorney for the personal representative is entitled to a fee for ordinary legal services and an additional fee for special services rendered to the estate. The fee is based on a stepped sliding scale percentage of the sum of the value of the estate plus the total earnings of the estate. While the fee for ordinary services is automatically payable unless objected to by an interested party, the fee for extraordinary services must be applied for and granted by the court. The amount and manner of determining the attorney’s compensation must be set forth in the final accounting, except under certain circumstances. No expert witness testimony is required. The court may also direct from what part of the estate the fee is to be paid. Fee proceedings as to attorney’s fees are considered a part of the probate case and not a separate proceeding. Moreover, the attorney’s fees for a court proceeding on fees may be separately compensable.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, this section deletes subsections (6), relating to the fee determination, and subsection (8), relating to attorney’s fee proceedings which are subsequently relocated to s. 733.6175, F.S. It deletes subsection (9), relating to disclosure of the personal representative’s attorney’s fees in the final accounting and waiver thereof by interested persons. This procedural provision already exists in Fla.Prob. R. 5.400(b)(4)(requisite content of a petition for discharge in the final accounting to include the amount of compensation to be paid to the attorneys) and Fla. Prob. R. 5.180 (waiver and consent). Subsection (10) is deleted which was declared unconstitutional in *Bitterman v. Bitterman*, 714 So.2d 356, 364 (Fla. 1998). In *Bitterman*, the Florida Supreme Court ruled that subsection (10) was an improper retroactive act, and that accordingly the “1993 changes can only be applied to cases for which the legal right to attorney’s fees vests on or after October 1, 1993.”

Section 141 amends s. 733.6175, F.S., regarding proceedings for review of employment of agents and compensation of personal representatives and employees of estate.

⁴⁵ A personal representative is not required to charge a fee or commission; and it is typical for personal representatives to waive the fee or commission.

Present Situation: The probate court may review the propriety of any cost, fee, or commission payable to a personal representative or professional employed by the estate. If contested, the burden of proof as to the propriety and reasonableness lies with the party seeking the cost, fee or commission. Section 733.6171(6), F.S., provides that the court may determine attorney's fees without receiving expert witness testimony; and that the court may direct from what part of the estate the fee is to be paid. Section 733.6171(8), F.S., provides that court proceedings to determine the reasonableness of an attorney's fee are a part of the probate case and thus not a separate proceeding. Further, the estate may be charged the attorney's fees incurred in a court proceeding on costs, fees and commissions.

Effect of Proposed Changes: The new subsection (1) is a restatement of existing law. The new subsection (2) contains the former provisions of s. 733.6171(8), F.S., relating to court proceedings to determine reasonable compensation as part of the estate administration process. It expands its application to the personal representative and 'any person' employed by the personal representative.⁴⁶ It is no longer the court's discretion to direct from which part of the estate the compensation is to be paid. Such direction must be made by the court. The new subsection (4) contains the former provisions of s. 733.6171(6), relating to the determination of compensation for a personal representative's attorney. The provision is expanded to allow the court to determine, without expert testimony, all reasonable compensation related to the personal representative and any other persons employed by the personal representative, not just involving compensation of the personal representative's attorney's fees. However, it is no longer the court's discretion to award reasonable expert witness fees. Such fees shall be awarded.

Section 142 amends s. 733.619, F.S., regarding individual liability of personal representative, to change grammar and style.

Part VII of Chapter 733, F.S. Creditors' Claims

Section 143 amends s. 733.701, F.S., regarding notification of creditors.

Present Situation: A personal representative must publish the notice of administration within 3 months of the first publication and must furnish a copy on all reasonably ascertainable creditors, unless the probate case is governed by Chapter 734, F.S. (ancillary administration), or Chapter 735, F.S. (summary and family administration). See s. 733.212, F.S. and s. 733.701, F.S. If a claim is not filed within 2 years of the decedent's death, then the creditor's claim is barred. See s. 733.710, F.S.

⁴⁶This supercedes the ruling in *In Estate of Good*, 696 So.2d 876 (Fla. 4th DCA 1997), *review denied*, 705 So.2d (Fla. 1997), in which a personal representative's attorney and a beneficiary contested the reasonableness of the attorney's fees. On appeal, the attorney employed separate appellate counsel. After the appeal concluded, the trial court awarded the attorney for the personal representative a separate fee for the appellate counsel. The beneficiary appealed the award of fees for the appellate counsel, and the appellate court, citing to the portion of s. 733.6171, F.S. which provides that only the attorney for the personal representative may be reimbursed fees incurred in a fee challenge, denied payment of the appellate fees.

Effect of Proposed Changes: It revises the notification process for creditors. It removes the exception for notice to creditors made in cases filed under chapters 734 or 735, F.S. It revises notice to creditors requirements by referring to the new section 733.2121, F.S., creating the form and manner of “notice to creditors.” It also clarifies that notice to creditors is not required if the claims are barred by s. 733.710, F.S.

Section 144 amends s. 733.702, F.S., regarding limitations on presentation of claims.

Present Situation: All claims against a decedent’s estate must be filed within the later of 3 months after the first publication of the notice of administration, or 30 days following service of a copy of the notice of administration upon the creditor. It does not specify where the claim must be filed. As a creditor of an estate, the Department of Revenue may file an untimely claim in a probate case if the claim is filed within 30 days after the service of the inventory on the department or within 30 days after service of an amended or supplementary inventory. The department reviews inventories filed in probate cases as part of the estate tax assessment process, and in determining whether the decedent failed to pay intangible tax during the decedent’s lifetime.

Effect of Proposed Changes: It specifies that a claim, if not already barred by s. 733.710, F.S. can not be binding on the estate, on the personal representative or on the beneficiary unless the claim is filed in the probate proceeding. Although the same time frames apply, the triggering period is revised as measured by the first publication of the notice to creditors or to service of the notice to creditors in lieu of the notice of administration. The same time periods apply.⁴⁷

It also revises limitations imposed on a personal representative’s settlement of claims not filed. It requires the approval of all interested persons, not just the beneficiaries. But it lifts the limitations on timing of such settlements.

It revises the provisions allowing for untimely filing of a claim by the Department of Revenue. The claim is limited to claims against the estate for intangible taxes. The 30-day time period for filing a claim subsequent to the service of an inventory remains unchanged. However, the department may also file a claim or an amended a claim within 30 days after service of an estate tax return or of an amended or supplemented inventory. It appears that an amended claim filed subsequent to an amended or supplemented inventory must pertain only to the additional information disclosed in the amended or supplemented inventory.

Section 145 amends, respectively, s. 733.703, F.S., regarding form and manner of presenting claim.

⁴⁷This change would alter the precedential effect of *Agency for Health Care Administration v. Estate of Johnson*, 743 So.2d 83 (Fla. 3rd DCA 1999)(the public record filing of a Medicaid lien by the Agency for Health Care Administration preceding a young boy’s death (and the filing of a caveat with the probate court) after the boy’s death was a filing sufficient to satisfy the requirement of s. 733.702, F.S., to allow AHCA to collect its \$700,000 lien against the estate’s personal injury settlement for \$2.2 million).

Present Situation: It provides that claimant's claim listed on a personal representative's proof of claim filed within 3 months after the first publication of the notice of administration constitutes a filing of a statement of claim.

Effect of Proposed Change: In addition to grammatical and stylistic changes, it specifies that a personal representative may file a proof of claim (of all claims paid or to be paid) within 3 months after first publication of the notice to creditors or within 30 days after the date of service of the notice to creditors required to be served.

Section 146 amends s. 733.704, F.S., regarding amendment of claims, to change grammar and style.

Section 147 amends s. 733.705, F.S., regarding payment of and objection to claims.

Present Situation: Any interested person may file an objection to a creditor's claim. The affected creditor then has 30 days from the date of service of the objection in which to initiate legal action relating to the claim. Failure to timely initiate the action bars the claim forever.

Effect of Proposed Changes: It makes the conforming changes relating to the notice to creditors in lieu of the notice of administration. It deletes the manner of service of the objection as procedural in nature and which is already contained in Fla. Prob. R. 5.496 (form and manner of objecting to a claim). It further provides that an objection to a claim constitutes an objection to an amendment of that claim unless the objection is withdrawn. This obviates the need to object each time a claim is amended. It adds a new subsection (3) to allow a personal representative, subject to court approval, to be relieved of the obligation to defend the estate in an action based on the objections of an interested person or to request that the objector be appointed as administrator ad litem to defend the action. Fees for the attorney for the administrator ad litem may be awarded pursuant to s. 733.106, F.S. In addition to the court's authority to extend the time to file an action after the filing of an objection, a personal representative may also grant (in writing) a creditor an extension of time within which to initiate legal action on an objected claim provided the extension is requested before the initial time period expires. Grammatical and stylistic changes are also made.

Section 148 amends s. 733.707, F.S., regarding order of payment of expenses and obligations.

Present Situation: Section 733.707, F.S., sets for the priority schedule order for payments of obligations by the estate. There are eight classes of claims and each class must be paid in full before payment can be made to any creditor in the subsequent class. If there are insufficient funds to pay a class in full, all allowed creditors of the class are paid pro-rata, and claims in following classes are not paid.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, it amends the prioritized classes of claims as follows:

Class 1--Costs, expenses of administration, and compensation of personal representatives and their attorneys' fees. It adds attorney's fees awarded under s. 733.106(3), F.S. These are

attorney's fees payable to an attorney who benefits the estate or increases assets available for payment of claims. These attorney's fees are a Class 8 claim under current law.⁴⁸

Class 2 --Reasonable funeral, interment, and grave marker expenses, whether paid by a guardian, the personal representative, or any other person, not to exceed the aggregate of \$6,000). It removes unnecessary cross-reference.

Class 3 --Debts and taxes with preference under federal law. It adds cross-references to ss. 409.9101, F.S., and 414.28, F.S., which already characterize claims filed thereunder as Class 3 claims.

Class 4 --Reasonable and necessary medical and hospital expenses of the last 60 days of the last illness of the decedent, including compensation of persons attending him or her. It only makes grammatical and stylistic changes.

Class 5--Family allowance. No necessary change is made here although the bill revises the total allowable family allowance under s. 732.403, F.S. from \$6,000 to \$18,000.

Class 6 --Arrearage from court-ordered child support. No change is made.

Class 7 --Debts acquired after death by the continuation of the decedent's business, but only to the extent of the assets of that business. No change is made.

Class 8 --All other claims, including those founded on judgments or decrees rendered against the decedent during the decedent's lifetime, and any excess over the sums allowed in Class 2 and Class 4. No change is made.

Section 149 amends s. 733.708, F.S., regarding compromise of claims. In addition to grammatical and stylistic changes, it provides that a court must be satisfied that the compromise will be in the best interest of all interested persons, not just the beneficiaries, before entering an order authorizing the compromise. It removes procedural matters already contained in Fla. Prob. R. 5.041 (service of pleadings and papers).

Section 150 amends s. 733.710, F.S., regarding limitations on claims against estates, to change grammar and style.

Part VIII of Chapter 733, F.S. Special Provisions for Distribution

Section 151 amends s. 733.801, F.S., regarding delivery of devises and distributive shares.

Present Situation: A personal representative cannot be compelled to pay or deliver property to a beneficiary until 5 months after the granting of letters of administration.

⁴⁸ Under current law, an attorney may work to increase the value of the estate, only to find that creditors in prior classes are entitled to all of the assets in the estate, which results in no payment to the attorney. An attorney faced with this possibility will typically refuse to act on behalf of the estate.

Effect of Proposed Changes: It adds a provision that, unless otherwise provided in the will, the personal representative must pay as an expense of the estate the reasonable expenses of storage, insurance, packing, and delivery of tangible personal property to a beneficiary.

Sections 152 and 153 amend s. 733.802, F.S., regarding proceedings for compulsory payment of devises or distributive interest, and s. 733.803, F.S., regarding unencumbered property. It only makes grammatical and stylistic changes to existing law.

Section 154 amends s. 733.805, F.S., regarding the order in which assets are appropriated.

Present Situation: Current law provides a default order for appropriating assets to fund bequests in a will when there are insufficient funds to satisfy the bequests in the will and where the will is unclear as to the order of bequests.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, it replaces the term “appropriate” to the more correct usage of “abate.” Subsection (3) is added, the text of which is moved from subsection (1) for clarity. It also adds subsection (4), which provides that a revocable trust of the decedent, and the decedent’s will, must be construed as one instrument for purposes of abatement⁴⁹, and for purposes of s. 733.607(2), F.S. (possession of estate), and s. 737.3054(2), F.S. (trustee’s duty to pay expenses and obligations of a settlor’s estate).

Section 155 amends s. 733.806, F.S., regarding advancement, to change grammar and style.

Section 156 amends s. 733.808, F.S., relating to the disposition of death benefit proceeds.

Present Situation: Death benefits⁵⁰ may be payable to a trustee of a trust created either before the death of the decedent, or by the decedent’s will. If the trustee does not claim the death benefits within 6 months after the decedent’s death, then the insurance company or obligor must pay the denefits to the personal representative of the estate unless otherwise provided by agreement with the insurer. Such death benefits are not a part of the probate estate. Thus, they are not subject to taxes, debts or other creditor claims nor are they used to compute the commission to a personal representative or the fees owed to the personal representative’s attorney.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, it expands the protection afforded death benefits. That is, it exempts from liability for the payment of expenses of administration, obligations of the estate or contributions required under s. 733.607(2), F.S. (right of an estate to demand the costs of administration from a revocable trust established by the decedent).

Section 157 amends s. 733.809, F.S., regarding right of retainer, to change grammar and style..

⁴⁹ Abatement is defined as the act of eliminating or nullifying. Black’s Law Dictionary, 7th Ed.

⁵⁰ Death benefits include the death benefits from an individual life insurance policy; a group life insurance policy; an employees’ trust or under a contract purchased by an employees’ trust forming part of a pension, stock bonus, or profit-sharing plan; an annuity or endowment contract; or a health and accident policy.

Section 158 amends s. 733.810, F.S., regarding distribution in kind and its valuation.

Present Situation: A “distribution in kind” is the transfer of a specific asset to a beneficiary, as opposed to selling the asset and distributing the net cash proceeds. A “pecuniary devise” is a devise in money. Assets must be distributed in kind unless a general power of sale is conferred in the will, the will specifies that an asset be sold, or a provision of the Probate Code requires that an asset be sold. The family allowance or a pecuniary devise may be satisfied by a distribution in kind unless the person entitled to it demands cash and no residuary devisee has requested that the asset remain a part of the residuary estate (a testamentary trust, elective share funding, pretermitted spouse or child shares, and the spouse’s portion of the intestate estate). Property distributed in kind must be valued at fair market value as of the date of distribution. Section 733.810(3), F.S., also provides that a personal representative or a trustee may, with the consent of all affected beneficiaries, distribute assets non-pro rata among the beneficiaries.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, it replaces the terms “personal representative, trustee or other fiduciary” with the all encompassing term “fiduciary.” It no longer requires the personal representative or trustee to secure consent of all beneficiaries before distribution of any distributable assets. The personal representative or trustee must act now subject to the fiduciary’s duty of impartiality.⁵¹

Section 159 amends s. 733.811, F.S., relating to a distributee’s right or title to distribution to change grammar and style, including replacing the term “personal representative” with the broader term “fiduciary” when referring from whom a distributee may receive a distribution.

Section 160 amends s. 733.812, F.S., regarding improper distribution or payment and liability thereunder.

Present Situation: A person who receives an improper distribution or payment from an estate must return the property or money received unless the distribution or payment can no longer be challenged based on adjudication, estoppel or other limitation. There is no statutory requirement to return income or interest earned from the improperly distributed or paid out funds.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, it adds a requirement that a person returning an improper distribution or payment from an estate must also pay to the estate income earned from the property or interest on the funds.

Section 161 amends s. 733.813, F.S., regarding the protection of purchasers who acquire property or interest from a distributee, regardless of its propriety. Only grammatical and stylistic changes are made.

Section 162 amends s. 733.814, F.S., regarding partition for purpose of distribution, to change grammar and style. It also requires that a partition be allotted *equitably* as well as conveniently.

⁵¹ “[Subsection] (5) is changed to permit non-prorata [sic] distributions without consent of the beneficiaries to attempt to obtain a favorable tax result under Rev. Rul. 69-486 by avoiding gain recognition on funding.” See Probate Code Committee Comments (9/17/2000).

Section 163 amends s. 733.815, F.S., relating to private agreements between distributees. It makes grammatical and stylistic changes to clarify that contracts may be entered into by all interested persons. In abiding by the terms of that contract, the personal representative remains obliged to administer the estate for the benefit of not only the creditors and beneficiaries not parties to the contract but also for the benefit of all interested persons who are not parties to the contract. For purposes of this section and as a conforming change, a trustee of a testamentary trust is an interested person.

Section 164 amends s. 733.816, F.S., regarding disposition of unclaimed property held by a personal representative.

Present Situation: Section 733.816, F.S., details how a personal representative is to deal with unclaimed property through court order to sell the property when the personal representative can not distribute or pay out because the owner can not be found or the owner is not known.

Effect of Proposed Changes: It adds that the provisions are applicable when the owner refuses to accept the property after a reasonable attempt to distribute it and after notice. Also, grammar and style changes are made.

Section 165 amends s. 733.817, F.S., regarding apportionment of estate taxes.

Present Situation: Section 733.817, F.S., provides the formula by which estate taxes are apportioned between interested parties. “Revocable trust” is defined to mean “a trust as defined in s. 731.201(33)⁵² created by the decedent to the extent that the decedent had at his or her death the power to alter, amend, or revoke the trust either alone or in conjunction with any other person.”

Effect of Proposed Changes: The term “revocable trust” is redefined to “a trust described in s. 733.707(3)”. Section 733.707(3), F.S., describes a revocable trust, and provides that certain revocable trusts are liable for the expenses of the estate administration and obligations of the decedent’s estate. Also, grammar and style changes are made.

Part IX of Chapter 733, F.S. Closing Estates

Section 166 amends s. 733.901, F.S., regarding final discharge.

⁵² Section 731.201(33), F.S., defines "trust" to mean "an express trust, private or charitable, with additions to it, wherever and however created. It also includes a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts; conservatorships; personal representatives; custodial arrangements pursuant to the Florida Gifts to Minors Act; business trusts providing for certificates to be issued to beneficiaries; common trust funds; land trusts under s. 689.05, F.S.; trusts created by the form of the account or by the deposit agreement at a financial institution; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is nominee or escrowee for another."

Present Situation: Section 733.901, F.S., provides court procedures necessary for the entry of a final discharge. Various accountings and other paperwork are prescribed.

Effect of Proposed Changes: It deletes court procedural matter already similarly contained in Fla. Prob. R. 5.346 (fiduciary accounting), R. 5.400 (distribution and discharge) and R. 5.401 (objections to discharge or final accounting). Also, grammar and style changes are made.

Section 167 amends s. 733.903, F.S., regarding subsequent administration.

Present Situation: After an estate is closed, further administration or revocation of an order of discharge or issuance of letters could occur if other estate property is subsequently discovered or if it become necessary for cause. However, discovery of a will or later will may not be the basis for the revocation of an order of discharge.

Effect of Proposed Changes: It allows the possibility of further administration without necessarily conditioning it upon the latent discovery of property or necessity. This provision as amended is no longer in conformity with Fla. Prob. R. 5.460 (subsequent administration after closed estate upon latent discovery of property or necessity). An order of discovery may still not be revoked based on the latent discovery of a will or later will. Grammatical and stylistic changes are also made.

Chapter 734, F.S.

Probate Code: Foreign Personal Representatives; Ancillary Administration

Section 168 amends s. 734.101, F.S., regarding foreign personal representative, to change grammar and style.

Section 169 amends s. 734.102, F.S., regarding ancillary administration.

Present Situation: An ancillary administration refers to the administration of Florida assets owned by a deceased nonresident. Section 734.102, F.S. provides court procedures necessary for the filing of a petition for ancillary administration.

Effect of Proposed Changes: It deletes procedural requirements similarly contained already in Fla. Prob. R. 5.470 (ancillary administration) and references the rules for purposes of initiating the ancillary administration. It adds that creditors in ancillary administration proceedings are subject to the same notice and service requirements applicable to creditors in domiciliary probate proceedings. Also, grammar and style changes are made.

Section 170 amends s. 734.1025, F.S., regarding small estates of certain nonresidents.

Present Situation: Section 734.1025, F.S., provides an optional abbreviated procedure for ancillary administration of a deceased nonresident's property totaling \$25,000 or less in

value.⁵³ The procedure is available to testate and intestate estates. To utilize the procedure, the personal representative for the probate case filed in the decedent's place of domicile must file copies of the relevant estate documents that show the proper disposition of the property, and must give notice to creditors. If no creditor claims are filed, the property may be distributed to the beneficiary of beneficiaries. If one or more creditor claims are filed, the abbreviated procedure terminates and the court must appoint an ancillary personal representative.

Effect of Proposed Changes: The abbreviated ancillary administration procedure is limited to testate estates. It increases the property threshold value from \$25,000 to \$50,000. It removes the procedural matters already contained in Fla. Prob. R. 5.475 (short-form ancillary administration. It shifts duties and rights of the domiciliary personal representative to the foreign personal representative. It also makes it an option in lieu of a requirement, to provide notice and service to creditors in accordance with chapter 733, F.S. Also, it changes grammar and style.

Section 171 amends s. 734.104, F.S., regarding foreign wills, to change grammar and style.

Section 172 amends s. 734.201, F.S., regarding jurisdiction by act of foreign personal representative, to change grammar and style and to correct an incorrect statutory cross-reference.

Section 173 amends s. 734.202, F.S., regarding jurisdiction by act of decedent, to change grammar and style.

Chapter 735, F.S. Family Administration and Small Estates

Part I: Family Administration

Sections 174, 175 and 176 repeal ss. 735.101, 735.103, and 735.107, F.S., respectively, relating to the process for family administration of an estate.

Present Situation: Family administration refers to an optional simplified probate proceeding for small intestate or testate estates where only the interest of family is affected, where the estate's value is less than \$60,000, or where the estate involves only personal property or real property (provided all other nonfamilial claims have been processed or barred). Fla. Prob. Rule 5.520 (family administration implements Part I of chapter 735, F.S.,

Effect of Proposed Changes: It eliminates the probate option for family administration.

⁵³ The \$25,000 figure is from Chapter 80-203, Laws of Florida. According to a calculation by the American Institute for Economic Research, using the Consumer Price Index calculated by the United States of America, Bureau of Labor Statistics, \$25,000 in 1980 equals \$52,123.79 in 2000. <http://www.aier.org>. The figure is rounded for ease in use and practice.

Part II of Chapter 735, F.S. Summary Administration

Section 177 amends s. 735.201, F.S., regarding summary administration in probate proceedings.

Present Situation: Summary administration is also an optional simplified probate proceeding for smaller estates. Summary administration is available for a resident or nonresident decedent's estate, where the value of the entire estate subject to administration in this state, less the value of property exempt from the claims of creditors, does not exceed \$25,000⁵⁴ or that the decedent has been dead for more than 2 years. It is not available in a testate estate if the decedent's will requires formal administration.

Effect of Proposed Changes: It expands the jurisdictional amount for summary administration of an estate from \$25,000 to \$75,000.

Section 178 amends s. 735.203, F.S., regarding petition for summary administration.

Present Situation: A petition for summary administration must be signed by all beneficiaries and by the personal representative named in the will, if there is one. The procedural requirements for the petition for summary administration are set forth.

Effect of Proposed Changes: It deletes procedural matters already contained in Fla. Prob. R. 5.530 (summary administration). Subsections (2) and (3) contain the slightly revised provisions from s. 735.209, F.S., relating to joinder or consent to a petition for summary administration, which is repealed by this bill.

The new subsections (2) and (3) provide that if a person named in subsection (1) dies, becomes incapacitated, or is a minor, or has conveyed or transferred all interest in property, then the petition for summary administration must be signed by either: a) the personal representative of the deceased person, and if none, the surviving spouse, if any, and the beneficiaries, or b) the beneficiaries of the guardian of an incapacitated person or minor.⁵⁵ This is a change from current law in that there does not have to be a prior joinder or consent to a petition for summary administration. In fact, a beneficiary who will receive full distributive share under the proposed distribution does not have to join or consent to the petition but such beneficiary must receive formal notice of the petition. There is also a change from existing law in that the order of who may sign and verify the petition is revised, and it also alternatively allows a grantee or transferee to sign and verify the petition on behalf of the beneficiary or the surviving spouse. Further, any beneficiary who will receive full distribution does not have to join in the petition for summary administration, but must be given formal notice of the petition.

⁵⁴ The \$25,000 figure is from Chapter 80-203, Laws of Florida. According to a calculation by the American Institute for Economic Research, using the Consumer Price Index calculated by the United States of America, Bureau of Labor Statistics, \$25,000 in 1980 equals \$52,123.79 in 2000. <http://www.aier.org>. The figure is rounded for ease in use and practice.

⁵⁵ For minors, the parents are the natural guardians, s. 744.301(1), F.S. A minor may also have a guardian appointed by a court pursuant to Chapter 744, F.S.

Section 179 amends s. 735.206, F.S., regarding summary administration distribution.

Present Situation: After a petition is filed for summary administration and the will is proved, a court may enter an order which directs distribution of the assets to the persons entitled to the assets. Notice to creditors is not required prior to entry of an order of summary administration⁵⁶ (see s. 735.2063, F.S.). Non-exempt property of the decedent in the hands of those to whom it is distributed are still subject to claims against the decedent until such time as the claims period has expired, i.e., two years from the date of death. Petitioners for orders of summary administration are liable for all claims against the estate up to the value of any distribution that the petitioner received, less the value of exempt property received.

Effect of Proposed Changes: It requires diligent search and reasonable inquiry to be made for any known or reasonably ascertainable creditors, service of petition on the creditors, and provision for payment of such creditors to the extent assets are available.⁵⁷ A known or reasonably ascertainable creditor who does not receive notice and for whom no provision is made for payment may enforce his or her claim and will be awarded attorney's fees if the creditor prevails. Recipients of property are subject to liability for creditors' claims on a pro-rata basis. Also, grammar and style changes are made.

Section 180 amends s. 735.2063, F.S., regarding notice to creditors.

Present Situation: Any person who has obtained an order of summary administration may publish notice to creditors. All creditor claims not filed within 3 months of the first publication are then barred.

Effect of Proposed Changes: Changes to s. 735.206, F.S., by this bill, require that known and reasonably ascertainable creditors of the decedent must be given a Notice to Creditors. Publication of a Notice to Creditors pursuant to s. 735.2063, F.S., in a summary administration, remains optional, as in current law. It specifies that publication of a Notice to Creditors will only bar the claim of a creditor that was not known or reasonably ascertainable. Also, grammar and style changes are made.

Section 181 repeals s. 735.209, F.S., regarding joinder of heirs, devisees, or surviving spouse in summary administration. These provisions are moved to s. 735.203, F.S.

Part III of Chapter 735, F.S. Disposition of Personal Property Without Administration

Section 182 amends s. 735.301, F.S., regarding disposition without administration, to change grammar and style.

⁵⁶Section 735.2063, F.S., provides that any person who has obtained an order of summary administration may publish notice to creditors, and that all creditor claims not filed within 3 months of the first publication are then barred.

⁵⁷This appears to address the due process concerns highlighted in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988) which necessitate "actual notice to known or reasonably ascertainable creditors" of a decedent of a pending probate case regarding that decedent in order to bar claims.

Section 183 amends s. 735.302, F.S., regarding income tax refunds in certain cases.

Present Situation: Where the United States Treasury Department determines that an overpayment of federal income tax exists and the person in whose favor the overpayment is determined is dead at the time the overpayment of tax is to be refunded, regardless of whether the decedent had filed a joint and several or separate income tax return, the amount of the overpayment, if not in excess of \$500, may be refunded directly to the surviving spouse on his or her verified application; or, if there is no surviving spouse, to one of decedent's children who is designated in a verified application purporting to be executed by all of the decedent's children over the age of 14 years. The application must show that the decedent was not indebted, that provision has been made for the payment of the decedent's debts, or that the entire estate is exempt from the claims of creditors under the constitution and statutes of the state, and that no administration of the estate, including summary administration, has been initiated and that none is planned, to the knowledge of the applicant. Section 735.302, F.S., is a method of paying a tax refund to the spouse or children of a deceased without requiring administration of the estate.

Effect of Proposed Changes: In addition to grammatical and stylistic changes, it increases from \$500 to \$2,500⁵⁸ the tax refund amount under which the simplified procedure of s. 735.320, F.S., may be utilized.

Chapter 737, F.S. Trust Administration⁵⁹

Section 184 creates s. 737.208, F.S., relating to a trustee's authority to continue the administration pending a trust contest proceeding.

Present Situation: Generally, no judicial intervention or prior court approval is needed for a trustee to distribute and manage a trust unless someone petitions for court oversight or approval. *See* s.737.201, F.S.

Effect of Proposed Changes: This section prohibits a trustee from making any distributions from the trust pending a contest of the validity of a trust or a determination of the beneficiaries

⁵⁸ The \$500 figure was enacted in 1974. According to a calculation by the American Institute for Economic Research, using the Consumer Price Index calculated by the United States of America, Bureau of Labor Statistics, \$500 in 1974 equals \$1,742.39 in 2000. <http://www.aier.org>. The increase to \$2,500 being beyond an inflationary adjustment, it represents a policy change.

⁵⁹ According to the Probate Law Committee Comments (9/17/2000), changes in the trust administration are for purposes of coordinating with changes in the Probate Code and attempt to address the holding in *Tobin*. In *Tobin v. Damian*, 723 So.2d 396 (Fla. 4th DCA 1999), the court ruled that a claim against a decedent who was a grantor of a revocable trust could not be filed directly against the trust, but had to be filed in the probate of the decedent. Also, the phrase "the expenses of the administration and obligations" of the decedent's estate has been used throughout the Probate Code and particularly in ch. 737.0 This has eliminated the troublesome term, "enforceable claims" referred to and partially defined in *Tobin*. These changes are a joint proposal of the Trust Law committee and the Probate Law Committee. Also, for uniformity throughout the trust law, as well as the Probate Code, the term, Grantor is substituted for Settlor. Grantor is a defined term in 731.201(17) and includes the term, Settlor.

under the trust, unless there is court approval for good cause shown.

Section 185 amends s. 737.3054, F.S., regarding trustee's duty to pay expenses and obligations of grantor's estate, to change grammar and style.

Section 186 amends s. 737.306, F.S., regarding personal liability of trustee.

Present Situation: A trustee of a trust is generally not liable for debts of the trust, with exceptions. Subsection (4) mirrors the general estate law by providing that, two years after the death of the settlor of a trust, the trust, the trustee, and beneficiaries, are not liable for debts of the settlor, with certain exceptions.

Effect of Proposed Changes: Subsection (4) is transferred to the new s. 737.3061, with changes made therein.

Section 187 creates s. 737.3061, F.S., regarding limitations on actions against certain trusts.

Present Situation: Section 737.306(4), F.S., mirrors the general estate law by providing that, two years after the death of the settlor of a trust, the trust, the trustee, and beneficiaries, are not liable for claims against the settlor of the trust. This bar does not apply to a creditor who has timely filed a claim against the settlor's estate and whose claim has not been paid or otherwise disposed of, even if the settlor's estate proceedings have been closed or otherwise completed. This bar does not affect the lien of a duly recorded mortgage or security interest or the right to foreclose and enforce the mortgage or lien.

Section 733.707(3), F.S., provides that a revocable trust owned by a decedent is liable for the expenses of the administration of the decedent's estate and is liable for "enforceable claims" of the decedent's creditors to the extent the decedent's estate is insufficient to pay them.

Effect of Proposed Changes: It creates s. 737.3061, regarding limitation on actions against certain trusts, based on s. 737.306(4), F.S. In accordance with the holding in *Tobin*, a creditor of a decedent may not file a direct action against a revocable trust, or the trustee or any beneficiary of the trust. Rather, any claim against the decedent is to be filed in the probate proceeding and the personal representative may then determine whether to seek to surcharge the revocable trust. A trust may still be named in an action that is not dependent on the individual liability of the grantor.

Section 188 amends s. 737.308, F.S., regarding notice of trust.

Present Situation: Section 737.308, F.S., requires that, upon the death of a settlor of a revocable trust, the trustee file a notice of trust with the court of the county of the settlor's domicile and with the court having jurisdiction of the settlor's estate. The clerk must treat the notice of trust like a caveat. Subsection (6) provides that the trustee of the revocable trust is an interested party in the estate. An "interested person" includes a trustee of a revocable trust of which the decedent was a settlor. *See* s. 731.201(21), F.S.

Effect of Proposed Changes: It deletes subsection (6) as superfluous. Also, grammar and style changes are made.

Miscellaneous Statutes

Sections 189, 190, and 191 amend respectively, s. 215.965, F.S. (relating to disbursement of state moneys), s. 660.46, F.S. (relating to substitution of fiduciaries), and s. 737.111, F.S. (relating to execution requirements for express trusts) changing a cross-reference to conform with other changes in the bill.

Other

Section 192 contains directions to the Division of Statutory Revision to change titles in the Probate Code.

Section 193 provides an effective date of January 1, 2002.

III. Effect of Proposed Changes:

See above section-by-section analysis.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill represents a major overhaul of the Probate Code to facilitate an expeditious administration of probate proceedings by clarifying the duties and rights of all interested persons including legal practitioners, by providing for uniformity and consistency in court procedural matters, and by modernizing the Code to reflect current law and practices on the state and federal level.

C. Government Sector Impact:

According to AHCA, the proposed changes to the Probate Code and to the Medicaid Estate Recovery Act may be inconsistent with federal Medicaid Law. In addition, there could also be a significant fiscal impact (estimates could be as high as \$10.2 million) based on the proposed 6-month limitation on amending Medicaid claims against the estate, assuming medical providers do not timely submit their claims. The state reportedly recovered \$10.2 million dollars for the fiscal year 1999-2000. The change from undue hardship to simply hardship as a means of barring AHCA's Medicaid recovery also conflicts with federal law requirements. Moreover, the application of the hardship exception to beneficiaries is broader than allowed by federal law which makes it only available to heirs at law.

The Florida Probate Rules will have to be substantially revised to implement, conform or reflect the statutory changes. As to the statutory procedural aspects that are in conflict with court rules, it is the court's jurisdictional prerogative as to whether those statutory provisions will be adopted in rules. The Office of State Courts Administrator anticipates that revising the court rules may require a significant amount of central staff attorney time. It is unknown what the precise fiscal impact will be.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 106: Section 733.503, F.S., is amended to eliminate the exception for appointing a successor personal representative or curator upon resignation of a personal representative in the event there is already a surviving joint personal representative. This raises the question of whether the court would be required to appoint a successor personal representative in those cases where there is a surviving joint personal representative. *See* page 88, lines 4-13.

VIII. Amendments:

None.