

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Commerce Committee

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BILL: CS/SB 2620

INTRODUCER: Commerce Committee and Senator Altman

SUBJECT: Estate Tax

DATE: April 7, 2010 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	<b>Favorable</b>
2.	O'Callaghan	Cooper	CM	<b>Fav/CS</b>
3.			FT	
4.			WPSC	
5.				
6.				

**Please see Section VIII. for Additional Information:**

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This CS revises the conditions under which Florida imposes estate tax on eligible property of a nonresident decedent. The tax is imposed only if the nonresident decedent's state of domicile imposes a tax on the transfer of a Florida resident's property located in that state and the tax imposed on the Florida resident is in excess of the taxes that would be imposed by Florida on transfers of the nonresident's similar property located in Florida. The tax imposed on the nonresident's property is equal to the tax that his or her resident state would impose on a Floridian having property in nonresident's state at the time of the Floridian's death.

The CS creates s. 733.1051, F.S., to limit the judicial construction of wills that are based on federal estate tax provisions, which are due to change January 1, 2011, to carry out the testator's intent. A will is subject to such construction upon the application of a personal representative or beneficiary of the estate if the testator dies during a specified period of time. However, a will may not be construed in such a manner if a disposition is specifically conditioned upon no federal estate or generation-skipping transfer tax being imposed.

The CS's provisions permit a personal representative during a specified period of time to conduct the administration of a will, containing provisions based on federal estate tax provisions, in a certain manner, unless otherwise ordered by a court.

This CS creates ss. 198.46 and 733.1051, F.S.

## II. Present Situation:

### Florida Estate Tax: Overview

The estate tax is a tax “imposed on the estate for the privilege of transferring property at death.”<sup>1</sup> The Florida Constitution prescribes, in part, the parameters for the state's imposition of estate tax, by prohibiting any estate tax upon Florida residents in excess the amount that may be credited upon or deducted from the federal estate tax or another state's estate tax.<sup>2</sup> Thus, the tax on a Florida decedent does not increase the total amount of tax paid by the estate.<sup>3</sup>

Chapter 198, F.S., governs estate taxes in Florida and establishes tax rates for the estates of residents and the estates of nonresidents. In the case of an estate of a resident decedent, the tax equals “the amount allowable as a credit against federal estate tax for state death taxes paid, less any amount paid to other states.”<sup>4</sup> In the case of an estate of a nonresident decedent, the tax equals “the amount allowable as a credit against federal estate tax for state death taxes paid multiplied by the ratio of the value of the property taxable in Florida over the value of the entire gross estate.”<sup>5</sup>

Because the State Constitution solely prohibits imposition of estate taxes upon residents in excess of the federal credit, one court has noted that the Legislature is not prohibited from imposing an estate tax on the estates of nonresidents.<sup>6</sup> In that case, a taxpayer challenged Florida's estate tax on nonresidents as violating the Privileges and Immunities Clause of the U.S. Constitution; however, the court decided the matter based on application of the Department of Revenue's rule and did not reach the constitutional question.<sup>7</sup> The court did suggest that, based on statutory construction, the tax on nonresident decedents may not impose a burden upon the decedent's estate in excess of the federal estate tax credit.<sup>8</sup>

For a nonresident, the Florida estate tax is imposed on the:

- Transfer of real property located in Florida;
- Tangible personal property having an actual situs in this state;
- Intangible personal property having a business situs in this state; and

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<sup>1</sup> Fla. Revenue Estimating Conference, *2010 Florida Tax Handbook, Including Fiscal Impact of Potential Changes*, 81, available at <http://edr.state.fl.us/taxhandbooks/taxhandbook2010.pdf> (last visited Mar. 28, 2010).

<sup>2</sup> FLA. CONST. art. VII, s. 5(a).

<sup>3</sup> *2010 Florida Tax Handbook*, *supra* note 1, at 81.

<sup>4</sup> *Id.*; see also s. 198.02, F.S.

<sup>5</sup> *2010 Florida Tax Handbook*, *supra* note 1, at 81; see also s. 198.03, F.S.

<sup>6</sup> See *Dep't of Revenue v. Good*, 398 So. 2d. 938, 940 (Fla. 3d DCA 1981).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 942.

- Stocks, bonds, debentures, notes, and other securities or obligations of corporations organized under Florida law.<sup>9</sup>

The personal representative must file a return with, and pay Florida estate tax, to the Department of Revenue no later than the date prescribed for filing the federal estate tax return, which is currently 9 months after the decedent's death.<sup>10</sup>

### **Effect of Federal Enactment on Florida and Other States**

Because Florida's estate tax is coupled with or tied to the federal estate tax, the enactment of the federal Economic Growth and Tax Relief Reconciliation Act of 2001<sup>11</sup> significantly affected the state's collection of estate taxes. That federal legislation phased out, starting in 2002, and ultimately eliminated the credit for state death taxes. Thus, a resident or nonresident decedent who owns Florida property and dies before January 1, 2011, is not subject to estate tax in Florida.<sup>12</sup> However, "[e]ffective January 1, 2011, the federal estate tax, including the credit for state taxes, is reinstated, reinstating Florida's estate tax."<sup>13</sup>

Before the enactment of the federal tax act, all 50 states plus the District of Columbia imposed an estate tax at least to the extent of the credit allowed against the federal estate tax, and some imposed additional estate and inheritance taxes. Since the enactment of the federal law, however, multiple states have amended or repealed their estate tax laws. An estimated 12 states have "decoupled" from the federal estate tax law and continue to levy an estate tax that is the same or very similar to the estate tax prior to the federal enactment. Other states replaced their tax with an estate tax that was similar to what they received from the "piggyback" tax but is not tied to the federal tax. Still other states levy a state inheritance or estate tax that was never tied to the federal tax.<sup>14</sup>

### **III. Effect of Proposed Changes:**

This CS substantially revises the imposition of Florida estate tax on property of nonresident decedents.

**Section 1** creates the "Florida Taxpayers Protection Act."

**Section 2** creates s. 198.46, F.S., to impose an estate tax on eligible property of a nonresident decedent. The tax is imposed only if the nonresident decedent's state of domicile imposes a tax on the transfer of a Florida resident's property located in that state and the tax imposed on the Florida resident is in excess of the taxes that would be imposed by Florida on transfers of the nonresident's similar property located in Florida. The tax imposed on the nonresident's property is equal to the tax that his or her resident state would impose on a Floridian having property in

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<sup>9</sup> Section 198.03, F.S.

<sup>10</sup> Sections 198.13(1) and 198.15(1), F.S.; *see also* Fla. Revenue Estimating Conference analysis of HB 1197 and SB 2620 (Mar. 18, 2010), available at <http://edr.state.fl.us/conferences/revenueimpact/pdf/impact0320.pdf> (see page 253) (last visited April 7, 2010).

<sup>11</sup> Pub. L. 107-16 (June 7, 2001); 115 Stat. 38.

<sup>12</sup> Benjamin A. Jablow, *The Ins and Outs of the Florida Estate Tax*, 79 FLA. B.J. 41, 44 (Jan. 2005).

<sup>13</sup> 2010 Florida Tax Handbook, *supra* note 1, at 81.

<sup>14</sup> *Id.* at 82.

nonresident's state at the time of the Floridian's death. These taxes are due, along with the tax returns, on or before the last day prescribed by the laws of the nonresident's state of domicile.

Currently, in the case of an estate of a nonresident decedent, the tax under s. 198.03, F.S., equals the amount allowable as a credit against federal estate tax for state death taxes paid, multiplied by the ratio of the value of the property taxable in Florida over the value of the entire gross estate. The tax is imposed against specified real, personal, and intangible property of the decedent which is located in or is otherwise connected to Florida (e.g., stocks of a business incorporated in Florida).

**Section 3** creates s. 733.1051, F.S., to limit the judicial construction of wills that are based on federal estate tax provisions, which are due to change January 1, 2011, to carry out the testator's intent. A will is subject to such construction upon the application of a personal representative or beneficiary of the estate and if the will contains a provision that:

- Includes a disposition formula referring to certain specified terms;
- Measures a share of an estate based on the amount that may pass free of federal estate tax or federal generation-skipping transfer tax;
- Makes a disposition referring to a charitable deduction, marital deduction, or other provision of federal estate tax or generation-skipping transfer tax law; or
- Appears to be intended to reduce or minimize the federal estate tax or generation-skipping transfer tax.

However, a will may not be construed in such a manner if a disposition is specifically conditioned upon no federal estate or generation-skipping transfer tax being imposed.

The CS's provisions permit a personal representative during a specified period of time to conduct the administration of a will, containing provisions based on federal estate tax provisions, in a certain manner, unless otherwise ordered by a court. Specifically, a personal representative may from January 1, 2010, until the earlier of December 31, 2010, or the day before an act becomes law that repeals or modifies s. 901 of the federal Economic Growth and Tax Relief Reconciliation Act of 2001:

- Delay and refrain from making any distribution;
- Incur and pay fees and costs reasonably necessary to determine its duties and obligations, including compliance with provisions of existing and reasonably anticipated future federal tax laws; or
- Establish and maintain reserves for the payment of fees and costs and federal taxes.

Paragraph (5)(b), provides that a personal representative is not liable for his or her actions permitted under the CS and made in good faith.

Subsection (7), provides that s. 733.1051, F.S., is to apply retroactively to January 1, 2010, to provide a new or modified legal remedy, if applicable.

**Section 4** provides an effective date of July 1, 2010, except as otherwise specified in the CS.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:****Commerce Clause, Privileges and Immunities Clause, Equal Protection Clause**

The federal Economic Growth and Tax Relief Reconciliation Act of 2001 eliminated the credit for state death taxes through December 31, 2010. Because Florida's existing estate tax is directly tied to the federal tax credit, currently a resident or nonresident decedent who owns Florida property and dies before January 1, 2011, is not subject to estate tax in Florida. Effective January 1, 2011, the federal estate tax, including the credit for state taxes, is reinstated – reinstating Florida's estate tax.

This CS, however, revises the conditions governing imposition of estate tax on estates of nonresident decedents. It imposes an estate tax on certain property of nonresident decedents if the decedent's home state would impose a tax in excess of the amount of taxes that would be imposed by Florida on transfers of the nonresident's similar property located in Florida. Under the CS, Florida's nonresident tax rate would no longer be directly tied to the federal credit. Rather, the rate will be the same rate imposed by the decedent's home state. The CS takes effect July 1, 2010. Thus, it creates the possibility for Florida estate tax to be imposed on a nonresident decedent (assuming his or her home state's tax rate is not tied to the federal credit) who dies between July 1, 2010, and December 31, 2010. During this same time, however, a resident decedent would not be subject to Florida estate tax (due to the phase-out of the federal state credit).

Further, once Florida's estate tax is reinstated for resident decedents, the potential effect of this CS is for nonresident decedents to be taxed at a different rate than resident decedents. Under the Florida Constitution, the tax on a resident decedent may not exceed the amount of the federal credit. However, this CS contemplates property of eligible nonresidents being taxed at his or her home state's rate, which may exceed the federal credit.

These two scenarios create the possibility of disparate tax treatment in Florida for the transfers of property of resident decedents versus nonresident decedents, which may in turn raise questions about federal constitutionality. There typically are three provisions of the U.S. Constitution under which a taxpayer may challenge an allegedly discriminatory

state tax: 1) the Commerce Clause; 2) the Privileges and Immunities Clause; and 3) the Equal Protection Clause.<sup>15</sup>

Research for this CS analysis revealed a wide range of case law and legal scholarship on the topic of state taxation of nonresidents. As a general proposition, and with variations based on the particular grounds for the challenge, factors that a court might take into consideration in evaluating a federal constitutional challenge to an allegedly discriminatory state tax are:

- Whether there is a substantial reason for the difference in tax treatment of nonresidents;<sup>16</sup>
- Whether the discrimination bears a substantial relationship to the state's objective;<sup>17</sup>
- Whether the tax is applied to an activity with a substantial nexus with the taxing state;<sup>18</sup>
- Whether the tax is fairly apportioned;<sup>19</sup>
- Whether the tax discriminates against interstate commerce;<sup>20</sup> and
- Whether the tax is fairly related to the services provided by the state.<sup>21</sup>

Because, under the CS, the estate tax on estates of nonresident decedents is imposed solely if the decedent's home state taxes similar property transfers of a Florida decedent, the proposal may be viewed as creating something akin to a "retaliatory tax." There is precedent for upholding retaliatory insurance taxes. From a Commerce Clause standpoint, however, one notable distinction for a retaliatory insurance tax is the fact that the federal McCarran-Ferguson Act removes Commerce Clause restrictions on a state's power to tax the insurance business.<sup>22</sup>

Additionally, should the tax on the transfer of a nonresident decedent's property be construed as an act affecting commerce and discriminatory against other states, the U.S. Supreme Court has held that such discrimination is unconstitutional and in violation of the Interstate Commerce Clause.<sup>23</sup>

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<sup>15</sup> *Western and Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648, 655-56 (1981).

<sup>16</sup> See, e.g., David Schmudde, *Constitutional Limitations on State Taxation of Nonresident Citizens*, 1999 L. REV. MICH. ST. U. DET. C.L. 95, 166 (1999) (discussing the U.S. Supreme Court holding in *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287 (1998)).

<sup>17</sup> See *id.*

<sup>18</sup> See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (addressing a Commerce Clause challenge to a state's application of its sales tax).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Western and Southern Life Insurance Co.*, 451 U.S. at 653 (upholding the state's retaliatory insurance tax against Commerce Clause and Equal Protection Clause challenges).

<sup>23</sup> See *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), where the Court struck down an Ohio tax credit designed to encourage the production of ethanol in Ohio by granting the tax credit against the state's motor fuel tax for each gallon of ethanol sold as a component of gasohol, but only if the ethanol was produced in Ohio or in a state that granted similar tax benefits to Ohio-produced ethanol.

## Retroactive Application of the Law

This CS provides that s. 733.1051, F.S., as created by the CS, operates retroactively to January 1, 2010.

In general, courts will refuse to apply a statute retroactively if it affects substantive rights, liabilities, and duties,<sup>24</sup> impairs vested rights, creates new obligations, or imposes new penalties.<sup>25</sup> However, statutes which do not alter contractual or vested rights, but relate only to remedies or procedure, can be applied retroactively.<sup>26</sup>

Florida courts have recognized that a statute may be retroactively applied if:

- There is clear evidence that the Legislature intended to apply the statute retroactively; and
- Retroactive application is constitutionally permissible.<sup>27</sup>

The CS appears to meet the first prong because the CS expressly states that it will apply retroactively to January 1, 2010.

In determining whether retroactive application is constitutional, courts have generally held that due process considerations prevent the retroactive abolition of vested rights.<sup>28</sup> This is not an absolute rule, however, because the courts have identified factors that may be considered in determining whether to allow retroactivity. In one case, the Supreme Court weighed three factors in considering the validity of retroactivity:

- The strength of the public interest served by the statute;
- The extent to which the right affected is abrogated; and
- The nature of the right affected.<sup>29</sup>

As a further consideration, the Court has ruled that when “an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof.”<sup>30</sup> There are numerous examples wherein the Court has rejected retroactivity<sup>31</sup> and has approved retroactivity.<sup>32</sup>

The constitutionality of this provision of the CS will likely turn on whether the court believes a party’s substantive rights would be affected by its application.

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<sup>24</sup> *Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324 (Fla. 3d DCA 2008).

<sup>25</sup> *Romine v. Florida Birth Related Neurological Injury Compensation Ass’n*, 842 So. 2d 148, 153 (Fla. 5th DCA 2003).

<sup>26</sup> *Menendez*, 979 So. 2d at 330.

<sup>27</sup> *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494 (Fla. 1999); *Promontory Enterprises, Inc. v. Southern Engineering & Contracting, Inc.*, 864 So. 2d 479 (Fla. 5th DCA. 2004).

<sup>28</sup> *State Dep’t of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981).

<sup>29</sup> *Id.*

<sup>30</sup> *Lowry v. Parole and Probation Comm’n*, 473 So. 2d 1248 (Fla. 1985).

<sup>31</sup> *State Dep’t of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981); *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995); *Kaiser v. Kolb*, 543 So. 2d 732 (Fla. 1989).

<sup>32</sup> *Dep’t of Agricultural Servs. v. Bonanno*, 568 So. 2d 24 (Fla. 1990); *Metropolitan Dade Co. v. Chase Federal Housing Corp.* 737 So. 2d 494 (Fla. 1999); *Orlando v. Desjardins*, 493 So. 2d 1027 (Fla. 1986); *Lakeland v. Catinella*, 129 So. 2d 133 (Fla. 1961).

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

On March 20, 2010, the Revenue Estimating Conference concluded that SB 2620 (2010) would have an indeterminate positive impact on revenues of the state.<sup>33</sup> It is likely that this CS would have a similar impact.

**B. Private Sector Impact:**

Florida property of a nonresident decedent will not be subject to Florida estate tax unless the state in which the person resided imposes estate taxes in excess of the amount Florida would impose on transfers of a nonresident's similar property located in Florida. The amount of tax due would be equal to the tax that the decedent's resident state would impose on a Floridian having property in nonresident's state at the time of the Floridian's death.

**C. Government Sector Impact:**

See discussion of "Tax/Fee Issues" above.

The Department of Revenue may incur administrative costs associated with determining different state estate or inheritance tax requirements to compute the taxes to be assessed under the provisions of the CS.

**VI. Technical Deficiencies:**

It is unclear how the creation of s. 198.46, F.S., would be applied and interpreted by courts without repealing s. 198.03, F.S., which also provides for the tax upon estates of nonresident decedents.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

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

**CS by the Commerce Committee on April 7, 2010:**

This CS differs from the bill in that it:

- Imposes a retaliatory estate, inheritance, or other death tax that may equal an amount greater than that provided for in the bill, depending on the taxing scheme of the nonresident's state of residence.

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<sup>33</sup> Fla. Revenue Estimating Conference, *supra* note 10.



- Changes the date taxes and tax returns are due (taxes are due before last day they are due in the decedent's resident state, instead of due 12 months after the death of decedent).
- Provides for limited judicial construction of a will containing federal tax provisions to carry out the testator's intent.

B. Amendments:

None.

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

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