

**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 Judiciary Committee

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BILL: SB 2620

INTRODUCER: Senator Altman

SUBJECT: Estate Tax

DATE: March 25, 2010

REVISED: 03/29/10

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Maclure</u>	<u>Maclure</u>	<u>JU</u>	<b>Favorable</b>
2.	<u>                    </u>	<u>                    </u>	<u>CM</u>	<u>                    </u>
3.	<u>                    </u>	<u>                    </u>	<u>FT</u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>WPSC</u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

**I. Summary:**

This bill revises the conditions under which Florida imposes estate tax on eligible property of a nonresident decedent, by specifying that estate tax is imposed only to the extent the decedent’s home state imposes the tax on nonresidents for the same type of property. In addition, the bill provides that the estate tax rate applicable to a nonresident decedent is the same rate imposed by the decedent’s home state. Under the bill, the amount of tax owed to Florida is the difference between: 1) the tax due in the home state with the addition of the Florida property and 2) the tax due in the home state as the return is initially computed without the Florida property.

This bill substantially amends section 198.03, Florida Statutes.

**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>

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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.

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:

- 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
- 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 nine 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

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<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.

<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 Mar. 28, 2010).

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

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

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).

Under the bill, Florida estate tax is imposed on the estate of a nonresident decedent only to the extent the decedent’s home state imposes an estate tax on nonresidents for the same type of property. In addition, the tax rate under the bill is the same rate imposed by the decedent’s home state, and the amount of tax owed to Florida is the additional tax that results from adding the Florida-related property to the return filed in the decedent’s home state. In other words, the tax amount would be the difference between: 1) the tax due in the home state with the addition of the Florida property and 2) the tax due in the home state as the return is initially computed without the Florida property.

The bill specifies that the tax shall be paid within 12 months after the person dies.

The bill provides an effective date of July 1, 2010.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

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<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.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

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 bill, 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 on the similar property of a Floridian. Under the bill, 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 bill 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 bill 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 bill 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 the Equal Protection Clause.<sup>15</sup>

Research for this bill 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

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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).

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 bill, 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>

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

On March 20, 2010, the Revenue Estimating Conference concluded that the legislation would have an indeterminate positive impact on revenues of the state.<sup>23</sup>

### 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 on similar property of nonresidents. When tax is due, the rate will be the same rate imposed in the decedent's home state.

<sup>16</sup> See, e.g., David Schmutde, *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> Fla. Revenue Estimating Conference, *supra* note 10.

C. **Government Sector Impact:**

See discussion of “Tax/Fee Issues” above.

**VI. Technical Deficiencies:**

On lines 30, 33, and 34, the bill’s newly added language uses the term “natural person” in describing a nonresident decedent whose estate may be subject to the Florida estate tax. However, existing statutory language in s. 198.03, F.S., left unchanged by the bill uses the term “person.” The Legislature may wish to conform all of the references in the section. The definition of “nonresident” in s. 198.01(7), F.S., specifies that the term applies to a natural person.

The bill provides that estate tax for a nonresident decedent must be paid within 12 months after the natural person’s death. However, existing s. 198.15, F.S., which is not revised by the bill, requires tax payments no later than the date prescribed for filing the federal estate tax return, which, according to the Department of Revenue, is currently nine months after the decedent’s death.<sup>24</sup> Because the bill does not reference or create an exception to s. 198.15, F.S., it may generate uncertainty on which deadline applies.

**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.)

None.

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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<sup>24</sup> Fla. Dep’t of Revenue, *2010 Bill Analysis: SB 2620* (Mar. 17, 2010) (on file with the Senate Committee on Judiciary).