

Council Substitute for House Bill No. 311

An act relating to probate; amending s. 222.21, F.S.; specifying additional circumstances under which certain funds or accounts are not exempt from a surviving spouse's claims; amending s. 731.110, F.S.; providing a prerequisite to admitting a will to probate or appointing a personal representative under certain circumstances; amending s. 731.201, F.S.; defining the terms "collateral heir" and "descendant"; creating s. 731.401, F.S.; providing for enforceability of will or trust provisions requiring arbitration of certain disputes; amending ss. 732.102, 732.103, 732.104, 732.108, 732.401, and 732.507, F.S.; conforming provisions to new definitions; amending s. 732.2025, F.S.; revising the definition of "elective share trust"; amending ss. 732.2035 and 732.2075, F.S.; revising provisions relating to the elective estate and elective share; amending s. 732.4015, F.S.; revising a provision prohibiting devise of a homestead; creating s. 733.620, F.S.; providing for unenforceability and invalidity of certain will provisions exculpating personal representatives; amending s. 734.101, F.S.; increasing a time period for procedures relating to foreign personal representatives; amending s. 895.02, F.S.; correcting a cross-reference; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (d) of subsection (2) of section 222.21, Florida Statutes, is amended to read:

222.21 Exemption of pension money and certain tax-exempt funds or accounts from legal processes.—

(2)

(d) Any fund or account described in paragraph (a) is not exempt from the claims of an alternate payee under a qualified domestic relations order or from the claims of a surviving spouse pursuant to an order determining the amount of elective share and contribution as provided in part II of chapter 732. However, the interest of any alternate payee under a qualified domestic relations order is exempt from all claims of any creditor, other than the Department of Revenue, of the alternate payee. As used in this paragraph, the terms "alternate payee" and "qualified domestic relations order" have the meanings ascribed to them in s. 414(p) of the Internal Revenue Code of 1986.

Section 2. Subsection (3) is added to section 731.110, Florida Statutes, to read:

731.110 Caveat; proceedings.—

(3) When a caveat has been filed by an interested person other than a creditor, the court shall not admit a will of the decedent to probate or appoint a personal representative until the petition for administration has been

served on the caveator or the caveator's designated agent by formal notice and the caveator has had the opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules.

Section 3. Subsections (6) and (7) and subsections (8) through (37) of section 731.201, Florida Statutes, as amended by section 29 of chapter 2006-217, Laws of Florida, are renumbered as subsections (7) and (8) and subsections (10) through (39), respectively, and new subsections (6) and (9) are added to that section, to read:

731.201 General definitions.—Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 736, 738, 739, and 744, the term:

(6) “Collateral heir” means an heir who is related to the decedent through a common ancestor but who is not an ancestor or descendant of the decedent.

(9) “Descendant” means a person in any generational level down the applicable individual's descending line and includes children, grandchildren, and more remote descendants. The term “descendant” is synonymous with the terms “lineal descendant” and “issue” but excludes collateral heirs.

Section 4. Section 731.401, Florida Statutes, is created to read:

731.401 Arbitration of disputes.—

(1) A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable.

(2) Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration under s. 44.104.

Section 5. Section 732.102, Florida Statutes, is amended to read:

732.102 Spouse's share of intestate estate.—The intestate share of the surviving spouse is:

(1) If there is no surviving ~~lineal~~ descendant of the decedent, the entire intestate estate.

(2) If there are surviving ~~lineal~~ descendants of the decedent, all of whom are also lineal descendants of the surviving spouse, the first \$60,000 of the intestate estate, plus one-half of the balance of the intestate estate. Property allocated to the surviving spouse to satisfy the \$60,000 shall be valued at the fair market value on the date of distribution.

(3) If there are surviving ~~lineal~~ descendants, one or more of whom are not lineal descendants of the surviving spouse, one-half of the intestate estate.

Section 6. Subsections (1), (2), and (6) of section 732.103, Florida Statutes, are amended to read:

732.103 Share of other heirs.—The part of the intestate estate not passing to the surviving spouse under s. 732.102, or the entire intestate estate if there is no surviving spouse, descends as follows:

(1) To the ~~lineal~~ descendants of the decedent.

(2) If there is no ~~lineal~~ descendant, to the decedent's father and mother equally, or to the survivor of them.

(6) If none of the foregoing, and if any of the descendants of the decedent's great-grandparents were Holocaust victims as defined in s. 626.9543(3)(a), including such victims in countries cooperating with the discriminatory policies of Nazi Germany, then to the ~~lineal~~ descendants of the great-grandparents. The court shall allow any such descendant to meet a reasonable, not unduly restrictive, standard of proof to substantiate his or her lineage. This subsection only applies to escheated property and shall cease to be effective for proceedings filed after December 31, 2004.

Section 7. Section 732.104, Florida Statutes, is amended to read:

732.104 Inheritance per stirpes.—Descent shall be per stirpes, whether to ~~lineal~~ descendants or to collateral heirs.

Section 8. Section 732.108, Florida Statutes, is amended to read:

732.108 Adopted persons and persons born out of wedlock.—

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

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

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

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

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

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

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

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

Section 9. Subsection (2) of section 732.2025, Florida Statutes, is amended to read:

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

(2) “Elective share trust” means a trust under which ~~where~~:

(a) The surviving spouse is entitled for life to the use of the property or to all of the income payable at least as often as annually;

(b) ~~The trust is subject to the provisions of former s. 738.12 or the surviving spouse has the right under the terms of the trust or state law to require the trustee either to make the property productive or to convert it within a reasonable time; and~~

(c) During the spouse’s life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.

As used in this subsection, the term “income” has the same meaning as that provided in s. 643(b) of the Internal Revenue Code, as amended, and regulations adopted under that section.

Section 10. Paragraph (b) of subsection (8) of section 732.2035, Florida Statutes, is amended to read:

732.2035 Property entering into elective estate.—Except as provided in s. 732.2045, the elective estate consists of the sum of the values as determined under s. 732.2055 of the following property interests:

(8) Property that was transferred during the 1-year period preceding the decedent’s death as a result of a transfer by the decedent if the transfer was either of the following types:

(b) Any transfer of property to the extent not otherwise included in the elective estate, made to or for the benefit of any person, except:

1. Any transfer of property for medical or educational expenses to the extent it qualifies for exclusion from the United States gift tax under s. 2503(e) of the Internal Revenue Code, as amended; and

2. After the application of subparagraph (b)1., the first annual exclusion amount \$10,000 of property transferred to or for the benefit of each donee during the 1-year period, but only to the extent the transfer qualifies for exclusion from the United States gift tax under s. 2503(b) or (c) of the Internal Revenue Code, as amended. For purposes of this subparagraph, the

term “annual exclusion amount” means the amount of one annual exclusion under s. 2503(b) or s. 2503(c) of the Internal Revenue Code, as amended.

Section 11. Subsection (2) of section 732.2075, Florida Statutes, is amended to read:

732.2075 Sources from which elective share payable; abatement.—

(2) If, after the application of subsection (1), the elective share is not fully satisfied, the unsatisfied balance shall be apportioned among the direct recipients of the remaining elective estate in the following order of priority:

(a) Class 1.—The decedent’s probate estate and revocable trusts.

(b) Class 2.—Recipients of property interests, other than protected charitable interests, included in the elective estate under s. 732.2035(2), (3), or (6) and, to the extent the decedent had at the time of death the power to designate the recipient of the property, property interests, other than protected charitable interests, included under s. 732.2035(5) and (7).

(c) Class 3.—Recipients of all other property interests, other than protected charitable interests, included in the elective estate.

(d) Class 4.—Recipients of protected charitable lead interests, but only to the extent and at such times that contribution is permitted without disqualifying the charitable interest in that property for a deduction under the United States gift tax laws.

For purposes of this subsection, a protected charitable interest is any interest for which a charitable deduction with respect to the transfer of the property was allowed or allowable to the decedent or the decedent’s spouse under the United States gift or income tax laws. A protected charitable lead interest is a protected charitable interest where one or more deductible interests in charity precede some other nondeductible interest or interests in the property.

Section 12. Subsection (1) of section 732.401, Florida Statutes, is amended to read:

732.401 Descent of homestead.—

(1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more lineal descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the ~~lineal~~ descendants in being at the time of the decedent’s death per stirpes.

Section 13. Subsection (1) of section 732.4015, Florida Statutes, is amended to read:

732.4015 Devise of homestead.—

(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.

Section 14. Subsection (1) of section 732.507, Florida Statutes, is amended to read:

732.507 Effect of subsequent marriage, birth, adoption, or dissolution of marriage.—

(1) Neither subsequent marriage, birth, nor adoption of ~~lineal~~ descendants shall revoke the prior will of any person, but the pretermitted child or spouse shall inherit as set forth in ss. 732.301 and 732.302, regardless of the prior will.

Section 15. Section 733.620, Florida Statutes, is created to read:

733.620 Exculpation of personal representative.—

(1) A term of a will relieving a personal representative of liability to a beneficiary for breach of fiduciary duty is unenforceable to the extent that the term:

(a) Relieves the personal representative of liability for breach of fiduciary duty committed in bad faith or with reckless indifference to the purposes of the will or the interests of interested persons; or

(b) Was inserted into the will as the result of an abuse by the personal representative of a fiduciary or confidential relationship with the testator.

(2) An exculpatory term drafted or caused to be drafted by the personal representative is invalid as an abuse of a fiduciary or confidential relationship unless:

(a) The personal representative proves that the exculpatory term is fair under the circumstances.

(b) The term's existence and contents were adequately communicated directly to the testator or to the independent attorney of the testator. This paragraph applies only to wills created on or after July 1, 2007.

Section 16. Subsections (3) and (4) of section 734.101, Florida Statutes, are amended to read:

734.101 Foreign personal representative.—

(3) Debtors who have not received a written demand for payment from a personal representative or curator appointed in this state within 90 ~~60~~ days after appointment of a personal representative in any other state or country, and whose property in Florida is subject to a mortgage or other lien securing the debt held by the foreign personal representative, may pay the foreign personal representative after the expiration of 90 ~~60~~ days from the date of appointment of the foreign personal representative. Thereafter, a

satisfaction of the mortgage or lien executed by the foreign personal representative, with an authenticated copy of the letters or other evidence of authority attached, may be recorded in the public records. The satisfaction shall be an effective discharge of the mortgage or lien, irrespective of whether the debtor making payment had received a written demand before paying the debt.

(4) Except as provided in s. 655.936, all persons indebted to the estate of a decedent, or having possession of personal property belonging to the estate, who have received no written demand from a personal representative or curator appointed in this state for payment of the debt or the delivery of the property are authorized to pay the debt or to deliver the personal property to the foreign personal representative after the expiration of 90 ~~60~~ days from the date of appointment of the foreign personal representative.

Section 17. Subsection (10) of section 895.02, Florida Statutes, is amended to read:

895.02 Definitions.—As used in ss. 895.01-895.08, the term:

(10) “Trustee” means any of the following:

(a) Any person acting as trustee pursuant to a trust established under s. 689.07 or s. 689.071 in which the trustee holds legal or record title to real property.

(b) Any person who holds legal or record title to real property in which any other person has a beneficial interest.

(c) Any successor trustee or trustees to any or all of the foregoing persons.

However, the term “trustee” does not include any person appointed or acting as a personal representative as defined in s. 731.201~~(27)(25)~~ or appointed or acting as a trustee of any testamentary trust or as a trustee of any indenture of trust under which any bonds have been or are to be issued.

Section 18. This act shall take effect July 1, 2007.

Approved by the Governor May 24, 2007.

Filed in Office Secretary of State May 24, 2007.