

CHAPTER 2010-132

Council Substitute for Committee Substitute for House Bill No. 1237

An act relating to probate procedures; amending s. 655.934, F.S.; updating terminology relating to a durable power of attorney; amending s. 655.935, F.S.; imposing additional duties on the lessor of a safe-deposit box relating to the contents of the box when the lessee has died; authorizing the lessor to charge fees for performing such duties; amending s. 731.110, F.S.; revising requirements relating to filing a caveat; providing that a caveat may be filed before or after a person's death; providing for the expiration of the caveat; amending s. 731.201, F.S.; revising the definitions of "formal notice" and "informal notice"; amending s. 731.301, F.S.; revising provisions relating to notice; amending s. 732.2125, F.S.; revising a provision relating to the right of election; amending s. 732.401, F.S.; providing that a decedent's spouse may elect to take an interest in a homestead as a tenant in common rather than a life estate; providing procedures and forms for filing notice of such election; providing that such election is irrevocable; providing for the allocation of expenses relating to the homestead; specifying that the interests of the decedent's descendants in the homestead may not be divested if the spouse's interest is disclaimed; amending s. 732.4015, F.S.; providing that if a spouse's interest in a homestead has been disclaimed, the disclaimed interest passes in accordance with ch. 739, F.S.; creating s. 732.4017, F.S.; providing for the inter vivos transfer of homestead property; providing limitations; amending s. 732.608, F.S.; revising provisions relating to which laws apply when determining intestate succession in certain circumstances; creating s. 732.805, F.S.; denying certain rights or benefits to a surviving spouse who procured a marriage by fraud, duress, or undue influence; providing procedures for challenging a surviving spouse; providing for the award of costs and fees; providing a limitation of liability relating to distributions made without notice of a pending claim; providing for means of notice; providing a time limitation on bringing such actions; creating s. 733.1051, F.S.; authorizing a court to construe the terms of certain wills for certain purposes under certain circumstances; providing definitions; providing criteria for court construction of a will; providing for nonapplication to certain dispositions; authorizing a personal representative to take certain actions without court order pending a determination of estate distribution; limiting personal representative liability; preserving certain rights to construe a will; providing for retroactive operation; amending s. 733.107, F.S.; providing that, in a will contest, certain affidavits and oaths are prima facie evidence relating to execution and attestation of a will; amending s. 733.2123, F.S.; deleting the requirement for attaching a copy of a will to a notice of a petition for administration; amending s. 733.608, F.S.; specifying the manner for serving notice of the personal representative's lien for expenditures and obligations incurred; amending s. 735.203, F.S.; revising provisions relating to providing notice for a petition for summary

administration; amending s. 736.1102, F.S.; clarifying provisions relating to which laws apply when determining intestate succession in certain circumstances; amending s. 744.444, F.S.; conforming provisions to changes made by the act; providing effective dates.

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

Section 1. Section 655.934, Florida Statutes, is amended to read:

655.934 Effect of lessee’s death or incapacity.—If a lessor without knowledge of the death or of an order determining the incapacity of the lessee deals with the lessee’s agent in accordance with a written power of attorney or a durable ~~family~~ power of attorney signed by such lessee, the transaction binds the lessee’s estate and the lessee.

Section 2. Section 655.935, Florida Statutes, is amended to read:

655.935 Search procedure on death of lessee.—If satisfactory proof of the death of the lessee is presented, a lessor shall permit the person named in a court order for that the purpose, or if no order has been served upon the lessor, the spouse, a parent, an adult descendant, or a person named as a personal representative in a copy of a purported will produced by such person, to open and examine the contents of a safe-deposit box leased or coleased by a decedent, or any documents delivered by a decedent for safekeeping, in the presence of an officer of the lessor; ~~and the lessor,~~

(1) If so requested by such person, the lessor shall remove and deliver only shall deliver:

(a)(1) Any writing purporting to be a will of the decedent, to the court having probate jurisdiction in the county in which the financial institution is located.

(b)(2) Any writing purporting to be a deed to a burial plot or to give burial instructions, to the person making the request for a search.

(c)(3) Any document purporting to be an insurance policy on the life of the decedent, to the beneficiary named therein.

(2) The officer of the lessor shall make a complete copy of any document removed and delivered pursuant to this section and place that copy, together with a memorandum of delivery identifying the name of the officer, the person to whom the document was delivered, the purported relationship of the person to whom the document was delivered, and the date of delivery, in the safe-deposit box leased or coleased by the decedent.

(3) The lessor may charge reasonable fees to cover costs incurred pursuant to this section.

~~(4) No other contents may be removed pursuant to this section. Access granted pursuant to this section is shall not be considered the initial opening~~

of the safe-deposit box pursuant to s. 733.6065 by a personal representative appointed by a court in this state.

Section 3. Section 731.110, Florida Statutes, is amended to read:

731.110 Caveat; proceedings.—

(1) Any interested person, including a creditor, who is apprehensive that an estate, either testate or intestate, will be administered or that a will may be admitted to probate without that the person’s knowledge may file a caveat with the court. The caveat of the interested person, other than a creditor, may be filed before or after the death of the person for whom the estate will be, or is being, administered. The caveat of a creditor may be filed only after the person’s death.

(2) ~~A caveat shall contain the decedent’s social security number, last known residence address, and date of birth, if they are known, as identification, a statement of the interest of the caveator in the estate, the name and specific residence address of the caveator, and, If the caveator, other than a state agency, is a nonresident and is not represented by an attorney admitted to practice in this state who has signed the caveat nonresident of the county, the caveator must designate additional name and specific residence address of some person residing in the county in which the caveat is filed, or office address of a member of The Florida Bar residing in Florida, designated as the agent of the caveator, upon whom service may be made; however, if the caveator is represented by an attorney admitted to practice in this state who has signed the caveat, it is not necessary to designate a resident agent.~~

(3) ~~If~~ When a caveat has been filed by an interested person other than a creditor, the court ~~may~~ shall not admit a will of the decedent to probate or appoint a personal representative until formal notice of 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.

(4) A caveat filed before the death of the person for whom the estate will be administered expires 2 years after filing.

Section 4. Subsections (18) and (22) of section 731.201, Florida Statutes, are amended 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:

(18) “Formal notice” means a form of formal notice that is described in and served by a method of services provided under rule 5.040(a) of the Florida Probate Rules.

(22) “Informal notice” or “notice” means a method of service for pleadings or papers as provided ~~informal notice~~ under rule 5.040(b) of the Florida Probate Rules.

Section 5. Section 731.301, Florida Statutes, is amended to read:

731.301 Notice.—

(1) ~~If~~ ~~When~~ notice to an interested person of a petition or other proceeding is required, the notice shall be given to the interested person or that person’s attorney as provided in the code or the Florida Probate Rules.

(2) ~~In a probate proceeding,~~ formal notice ~~is~~ ~~shall be~~ sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person’s interest in the estate or in the decedent’s protected homestead.

(3) Persons given proper notice of ~~a any~~ proceeding ~~are~~ ~~shall be~~ bound by all orders entered in that proceeding.

Section 6. Subsection (2) of section 732.2125, Florida Statutes, is amended to read:

732.2125 Right of election; by whom exercisable.—The right of election may be exercised:

(2) With approval of the court having jurisdiction of the probate proceeding by an attorney in fact or a guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in as the best interests of the surviving spouse; during the spouse’s probable lifetime, ~~require.~~

Section 7. Section 732.401, Florida Statutes, is amended to read:

732.401 Descent of homestead.—

(1) If not devised as authorized ~~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 descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent’s death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent’s descendants in being at the time of the decedent’s death, per stirpes.

(a) The right of election may be exercised:

1. By the surviving spouse; or

2. With the approval of a court having jurisdiction of the real property, by an attorney in fact or guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in the best interests of the surviving spouse during the spouse's probable lifetime.

(b) The election must be made within 6 months after the decedent's death and during the surviving spouse's lifetime. The time for making the election may not be extended except as provided in paragraph (c).

(c) A petition by an attorney in fact or guardian of the property for approval to make the election tolls the time for making the election until 6 months after the decedent's death or 30 days after the rendition of an order authorizing the election, whichever occurs last.

(d) Once made, the election is irrevocable.

(e) The election shall be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located. The notice must be in substantially the following form:

ELECTION OF SURVIVING SPOUSE
TO TAKE A ONE-HALF INTEREST OF
DECEDENT'S INTEREST IN HOMESTEAD PROPERTY

STATE OF.....

COUNTY OF.....

1. The decedent,, died on On the date of the decedent's death, The decedent was married to, who survived the decedent.

2. At the time of the decedent's death, the decedent owned an interest in real property that the affiant believes to be homestead property described in s. 4, Article X of the State Constitution, that real property being in County, Florida, and described as: ...(description of homestead property)....

3. Affiant elects to take one-half of decedent's interest in the homestead as a tenant in common in lieu of a life estate.

4. If affiant is not the surviving spouse, affiant is the surviving spouse's attorney in fact or guardian of the property and an order has been rendered by a court having jurisdiction of the real property authorizing the under- signed to make this election.

.....

...(Affiant)...

Sworn to (or affirmed) and subscribed before me this day of ...(month)...., ... (year)...., by ...(affiant)...

...(Signature of Notary Public-State of Florida)...

...(Print, Type, or Stamp Commissioned Name of Notary Public)...

Personally Known OR Produced Identification

...(Type of Identification Produced)...

(3) Unless and until an election is made under subsection (2), expenses relating to the ownership of the homestead shall be allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen, in accordance with chapter 738. If an election is made, expenses relating to the ownership of the homestead shall be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares, effective as of the date the election is filed for recording.

(4) If the surviving spouse's life estate created in subsection (1) is disclaimed pursuant to chapter 739, the interests of the decedent's descendants may not be divested.

(5)(2) This section does ~~Subsection (1)~~ shall not apply to property that the decedent and the surviving spouse owned in tenancy by the entireties or joint tenancy with rights of survivorship as tenants by the entirety.

Section 8. Subsection (3) is added to section 732.4015, Florida Statutes, to read:

732.4015 Devise of homestead.—

(3) If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse's interest is disclaimed, the disclaimed interest shall pass in accordance with chapter 739.

Section 9. Section 732.4017, Florida Statutes, is created to read:

732.4017 Inter vivos transfer of homestead property.—

(1) If the owner of homestead property transfers an interest in that property, including a transfer in trust, with or without consideration, to one or more persons during the owner's lifetime, the transfer is not a devise for purposes of s. 731.201(10) or s. 732.4015, and the interest transferred does

not descend as provided in s. 732.401 if the transferor fails to retain a power, held in any capacity, acting alone or in conjunction with any other person, to revoke or revest that interest in the transferor.

(2) As used in this section, the term “transfer in trust” refers to a trust under which the transferor of the homestead property, alone or in conjunction with another person, does not possess a right of revocation as that term is defined in s. 733.707(3)(e). A power possessed by the transferor which is exercisable during the transferor’s lifetime to alter the beneficial use and enjoyment of the interest within a class of beneficiaries identified only in the trust instrument is not a right of revocation if the power may not be exercised in favor of the transferor, the transferor’s creditors, the transferor’s estate, or the creditors of the transferor’s estate or exercised to discharge the transferor’s legal obligations. This subsection does not create an inference that a power not described in this subsection is a power to revoke or revest an interest in the transferor.

(3) The transfer of an interest in homestead property described in subsection (1) may not be treated as a devise of that interest even if:

(a) The transferor retains a separate legal or equitable interest in the homestead property, directly or indirectly through a trust or other arrangement such as a term of years, life estate, reversion, possibility of reverter, or fractional fee interest;

(b) The interest transferred does not become a possessory interest until a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, the death of the transferor; or

(c) The interest transferred is subject to divestment, expiration, or lapse upon a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, survival of the transferor.

(4) It is the intent of the Legislature that this section clarify existing law.

Section 10. Section 732.608, Florida Statutes, is amended to read:

732.608 Construction of generic terms.—The laws used to determine paternity and Adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship, in accordance with rules for determining relationships for the purposes of intestate succession apply when determining whether class gift terminology and terms of relationship include adopted persons and persons born out-of-wedlock.

Section 11. Section 732.805, Florida Statutes, is created to read:

732.805 Spousal rights procured by fraud, duress, or undue influence.

(1) A surviving spouse who is found to have procured a marriage to the decedent by fraud, duress, or undue influence is not entitled to any of the following rights or benefits that inure solely by virtue of the marriage or the person's status as surviving spouse of the decedent unless the decedent and the surviving spouse voluntarily cohabited as husband and wife with full knowledge of the facts constituting the fraud, duress, or undue influence or both spouses otherwise subsequently ratified the marriage:

(a) Any rights or benefits under the Florida Probate Code, including, but not limited to, entitlement to elective share or family allowance; preference in appointment as personal representative; inheritance by intestacy, home-stead, or exempt property; or inheritance as a pretermitted spouse.

(b) Any rights or benefits under a bond, life insurance policy, or other contractual arrangement if the decedent is the principal obligee or the person upon whose life the policy is issued, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the bond, life insurance policy, or other contractual arrangement.

(c) Any rights or benefits under a will, trust, or power of appointment, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the will, trust, or power of appointment.

(d) Any immunity from the presumption of undue influence that a surviving spouse may have under state law.

(2) Any of the rights or benefits listed in paragraphs (1)(a)-(c) which would have passed solely by virtue of the marriage to a surviving spouse who is found to have procured the marriage by fraud, duress, or undue influence shall pass as if the spouse had predeceased the decedent.

(3) A challenge to a surviving spouse's rights under this section may be maintained as a defense, objection, or cause of action by any interested person after the death of the decedent in any proceeding in which the fact of marriage may be directly or indirectly material.

(4) The contestant has the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence. If ratification of the marriage is raised as a defense, the surviving spouse has the burden of establishing, by a preponderance of the evidence, the subsequent ratification by both spouses.

(5) In all actions brought under this section, the court shall award taxable costs as in chancery actions, including attorney's fees. When awarding taxable costs and attorney's fees, the court may direct payment from a party's interest, if any, in the estate, or enter a judgment that may be satisfied from other property of the party, or both.

(6) An insurance company, financial institution, or other obligor making payment according to the terms of its policy or obligation is not liable by

reason of this section unless, before payment, it received written notice of a claim pursuant to this section.

(a) The notice required by this subsection must be in writing and must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice. Permissible methods of notice include first-class mail, personal delivery, delivery to the person’s last known place of residence or place of business, or a properly directed facsimile or other electronic message.

(b) To be effective, notice to a financial institution or insurance company must contain the name, address, and the taxpayer identification number, or the account or policy number, of the principal obligee or person whose life is insured and shall be directed to an officer or a manager of the financial institution or insurance company in this state. If the financial institution or insurance company has no offices in this state, the notice shall be directed to the principal office of the financial institution or insurance company.

(c) Notice shall be effective when given, except that notice to a financial institution or insurance company is not effective until 5 business days after being given.

(7) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or equity.

(8) Unless sooner barred by adjudication, estoppel, or a provision of the Florida Probate Code or Florida Probate Rules, an interested person is barred from bringing an action under this section unless the action is commenced within 4 years after the decedent’s date of death. A cause of action under this section accrues on the decedent’s date of death.

Section 12. Effective upon this act becoming a law, section 733.1051, Florida Statutes, is created to read:

733.1051 Limited judicial construction of will with federal tax provisions.-

(1) Upon the application of a personal representative or a person who is or may be a beneficiary who is affected by the outcome of the construction, a court at any time may construe the terms of a will to define the respective shares or determine beneficiaries, in accordance with the intention of a testator, if a disposition occurs during the applicable period and the will contains a provision that:

(a) Includes a disposition formula referring to the terms “unified credit,” “estate tax exemption,” “applicable exemption amount,” “applicable credit amount,” “applicable exclusion amount,” “generation-skipping transfer tax exemption,” “GST exemption,” “marital deduction,” “maximum marital deduction,” “unlimited marital deduction,” or “maximum charitable deduction”;

(b) Measures a share of an estate based on the amount that may pass free of federal estate tax or the amount that may pass free of federal generation-skipping transfer tax;

(c) Otherwise makes a disposition referring to a charitable deduction, marital deduction, or another provision of federal estate tax or generation-skipping transfer tax law; or

(d) Appears to be intended to reduce or minimize the federal estate tax or generation-skipping transfer tax.

(2) For purposes of this section:

(a) The term “applicable period” means a period beginning January 1, 2010, and ending on the end of the day on the earlier of December 31, 2010, or the day before the date that an act becomes law that repeals or otherwise modifies or has the effect of repealing or modifying s. 901 of The Economic Growth and Tax Relief Reconciliation Act of 2001.

(b) A “disposition occurs” when the testator dies.

(3) In construing the will, the court shall consider the terms and purposes of the will, the facts and circumstances surrounding the creation of the will, and the testator’s probable intent. In determining the testator’s probable intent, the court may consider evidence relevant to the testator’s intent even though the evidence contradicts an apparent plain meaning of the will.

(4) This section does not apply to a disposition that is specifically conditioned upon no federal estate or generation-skipping transfer tax being imposed.

(5)(a) Unless otherwise ordered by the court, during the applicable period and without court order, the personal representative administering a will containing one or more provisions described in subsection (1) may:

1. Delay or refrain from making any distribution.

2. 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.

3. Establish and maintain reserves for the payment of these fees and costs and federal taxes.

(b) The personal representative shall not be liable for its actions as provided in this subsection made or taken in good faith.

(6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to construe a will.

(7) This section is remedial in nature and intended to provide a new or modified legal remedy. This section shall operate retroactively to January 1, 2010.

Section 13. Subsection (1) of section 733.107, Florida Statutes, is amended to read:

733.107 Burden of proof in contests; presumption of undue influence.—

(1) In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. A self-proving affidavit executed in accordance with s. 732.503 or an oath of an attesting witness executed as required in s. 733.201(2) is admissible and establishes prima facie the formal execution and attestation of the will. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought.

Section 14. Section 733.2123, Florida Statutes, is amended to read:

733.2123 Adjudication before issuance of letters.—A petitioner may serve formal notice of the petition for administration on interested persons. ~~A copy of the will offered for probate shall be attached to the notice. A~~ No person who is served with such formal notice before of the ~~petition for administration prior to~~ the issuance of letters or who has waived notice may not challenge the validity of the will, testacy of the decedent, qualifications of the personal representative, venue, or jurisdiction of the court, except in the proceedings before issuance of letters.

Section 15. Subsection (4) of section 733.608, Florida Statutes, is amended to read:

733.608 General power of the personal representative.—

(4) The personal representative's lien shall attach to the property and take priority as of the date and time a notice of that lien is recorded in the official records of the county where that property is located, and the lien may secure expenditures and obligations incurred, including, but not limited to, fees and costs made before or after recording the notice. The notice of lien may be recorded before adjudicating prior to the adjudication of the amount of the debt. The notice of lien also shall also be filed in the probate proceeding, but failure to do so does shall not affect the validity of the lien. A copy of the notice of lien shall be served in the manner provided for service of by formal notice upon each person appearing to have an interest in the property. The notice of lien must shall state:

(a) The name and address of the personal representative and the personal representative's attorney;

(b) The legal description of the property;

(c) The name of the decedent and also, to the extent known to the personal representative, the name and address of each person appearing to have an interest in the property; and

(d) That the personal representative has expended or is obligated to expend funds to preserve, maintain, insure, and protect the property and that the lien stands as security for recovery of those expenditures and obligations incurred, including, but not limited to, fees and costs.

Substantial compliance with the foregoing provisions renders ~~shall render~~ the notice in comportment with this section.

Section 16. Subsections (1) and (3) of section 735.203, Florida Statutes, are amended to read:

735.203 Petition for summary administration.—

(1) A petition for summary administration may be filed by any beneficiary or person nominated as personal representative in the decedent's will offered for probate. The petition must be signed and verified by the surviving spouse, if any, and any beneficiaries except that the joinder in a petition for summary administration is not required of a beneficiary who will receive a full distributive share under the proposed distribution. However, formal notice of the petition must be served on a ~~Any~~ beneficiary not joining in shall be served by formal notice with the petition.

(3) If each trustee of a trust that is a beneficiary of the estate of the deceased person is also a petitioner, formal notice of the petition for summary administration shall be served on each qualified beneficiary of the trust as defined in s. 736.0103 shall be served by formal notice with the petition for summary administration ~~unless joinder in, or consent to, the petition is obtained from each qualified beneficiary of the trust.~~

Section 17. Section 736.1102, Florida Statutes, is amended to read:

736.1102 Construction of generic terms.—The laws used to determine paternity and Adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship, in accordance with rules for determining relationships for the purposes of intestate succession apply when determining whether class gift terminology and terms of relationship include adopted persons and persons born out of wedlock.

Section 18. Subsection (9) of section 744.444, Florida Statutes, is amended to read:

744.444 Power of guardian without court approval.—Without obtaining court approval, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(9) Elect ~~whether~~ to dissent from a will under ~~the provisions of s. 732.2125(2),~~ seek approval to make an election in accordance with s. 732.401, or assert any other right or choice available to a surviving spouse in the administration of a decedent's estate.

Section 19. Except as otherwise expressly provided in this act, this act shall take effect October 1, 2010.

Approved by the Governor May 27, 2010.

Filed in Office Secretary of State May 27, 2010.