

CHAPTER 2017-121

Committee Substitute for Committee Substitute for Senate Bill No. 724

An act relating to estates; amending s. 732.2025, F.S.; conforming cross-references; amending s. 732.2035, F.S.; providing that a decedent's property interest in the protected homestead is included in the elective estate; amending s. 732.2045, F.S.; revising the circumstances under which the decedent's property interest in the protected homestead is excluded from the elective estate; amending s. 732.2055, F.S.; providing for the valuation of the decedent's protected homestead under certain circumstances; amending s. 732.2075, F.S.; conforming cross-references; amending s. 732.2085, F.S.; requiring the payment of interest on any unpaid portion of a person's required contribution toward the elective share with respect to certain property; amending s. 732.2095, F.S.; revising provisions relating to the valuation of a surviving spouse's interest in property to include protected homestead; conforming cross-references; amending s. 732.2115, F.S.; conforming a cross-reference; amending s. 732.2135, F.S.; revising the period within which a specified person may petition the court for an extension of time for making an election; removing a provision authorizing assessment of attorney fees and costs if an election is made in bad faith; amending s. 732.2145, F.S.; requiring the payment of interest on any unpaid portion of a person's required contribution toward the elective share after a certain date; creating s. 732.2151, F.S.; providing for the award of fees and costs in certain elective share proceedings; providing that a court may direct payment from certain sources; providing applicability; amending s. 738.606, F.S.; providing that a surviving spouse may require a trustee of a marital or elective share trust to make property productive of income; providing applicability; providing an effective date.

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

Section 1. Subsections (1) and (9) of section 732.2025, Florida Statutes, are amended to read:

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

(1) "Direct recipient" means the decedent's probate estate and any other person who receives property included in the elective estate by transfer from the decedent, including transfers described in s. 732.2035(9) ~~s. 732.2035(8)~~, by right of survivorship, or by beneficiary designation under a governing instrument. For this purpose, a beneficiary of an insurance policy on the decedent's life, the net cash surrender value of which is included in the elective estate, is treated as having received property included in the elective estate. In the case of property held in trust, "direct recipient" includes the trustee but excludes the beneficiaries of the trust.

(9) “Revocable trust” means a trust that is includable in the elective estate under s. 732.2035(5) ~~s. 732.2035(4)~~.

Section 2. 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:

(1) The decedent’s probate estate.

(2) The decedent’s interest in property which constitutes the protected homestead of the decedent.

(3) The decedent’s ownership interest in accounts or securities registered in “Pay On Death,” “Transfer On Death,” “In Trust For,” or coownership with right of survivorship form. For this purpose, “decedent’s ownership interest” means, in the case of accounts or securities held in tenancy by the entirety, one-half of the value of the account or security, and in all other cases, that portion of the accounts or securities which the decedent had, immediately before death, the right to withdraw or use without the duty to account to any person.

(4)(3) The decedent’s fractional interest in property, other than property described in subsection (3)(2) or subsection (8)(7), held by the decedent in joint tenancy with right of survivorship or in tenancy by the entirety. For this purpose, “decedent’s fractional interest in property” means the value of the property divided by the number of tenants.

(5)(4) That portion of property, other than property described in subsection (2) and subsection (3), transferred by the decedent to the extent that at the time of the decedent’s death the transfer was revocable by the decedent alone or in conjunction with any other person. This subsection does not apply to a transfer that is revocable by the decedent only with the consent of all persons having a beneficial interest in the property.

(6)(a)(5)(a) That portion of property, other than property described in subsection (2)(3), subsection (4), subsection (5), or subsection (8)(7), transferred by the decedent to the extent that at the time of the decedent’s death:

1. The decedent possessed the right to, or in fact enjoyed the possession or use of, the income or principal of the property; or

2. The principal of the property could, in the discretion of any person other than the spouse of the decedent, be distributed or appointed to or for the benefit of the decedent.

In the application of this subsection, a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement

shall be treated as a right to that portion of the income of the property necessary to equal the annuity, unitrust, or other payment.

(b) The amount included under this subsection is:

1. With respect to subparagraph (a)1., the value of the portion of the property to which the decedent’s right or enjoyment related, to the extent the portion passed to or for the benefit of any person other than the decedent’s probate estate; and

2. With respect to subparagraph (a)2., the value of the portion subject to the discretion, to the extent the portion passed to or for the benefit of any person other than the decedent’s probate estate.

(c) This subsection does not apply to any property if the decedent’s only interests in the property are that:

1. The property could be distributed to or for the benefit of the decedent only with the consent of all persons having a beneficial interest in the property; or

2. The income or principal of the property could be distributed to or for the benefit of the decedent only through the exercise or in default of an exercise of a general power of appointment held by any person other than the decedent; or

3. The income or principal of the property is or could be distributed in satisfaction of the decedent’s obligation of support; or

4. The decedent had a contingent right to receive principal, other than at the discretion of any person, which contingency was beyond the control of the decedent and which had not in fact occurred at the decedent’s death.

~~(7)(6)~~ The decedent’s beneficial interest in the net cash surrender value immediately before death of any policy of insurance on the decedent’s life.

~~(8)(7)~~ The value of amounts payable to or for the benefit of any person by reason of surviving the decedent under any public or private pension, retirement, or deferred compensation plan, or any similar arrangement, other than benefits payable under the federal Railroad Retirement Act or the federal Social Security System. In the case of a defined contribution plan as defined in s. 414(i) of the Internal Revenue Code of 1986, as amended, this subsection shall not apply to the excess of the proceeds of any insurance policy on the decedent’s life over the net cash surrender value of the policy immediately before the decedent’s death.

~~(9)(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:

(a) Any property transferred as a result of the termination of a right or interest in, or power over, property that would have been included in the elective estate under subsection ~~(5)(4)~~ or subsection ~~(6)(5)~~ if the right, interest, or power had not terminated until the decedent's death.

(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 1., the first annual exclusion amount 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 (c) of the Internal Revenue Code, as amended.

(c) Except as provided in paragraph (d), for purposes of this subsection:

1. A "termination" with respect to a right or interest in property occurs when the decedent transfers or relinquishes the right or interest, and, with respect to a power over property, a termination occurs when the power terminates by exercise, release, lapse, default, or otherwise.

2. A distribution from a trust the income or principal of which is subject to subsection ~~(5)(4)~~, subsection ~~(6)(5)~~, or subsection ~~(10)(9)~~ shall be treated as a transfer of property by the decedent and not as a termination of a right or interest in, or a power over, property.

(d) Notwithstanding anything in paragraph (c) to the contrary:

1. A "termination" with respect to a right or interest in property does not occur when the right or interest terminates by the terms of the governing instrument unless the termination is determined by reference to the death of the decedent and the court finds that a principal purpose for the terms of the instrument relating to the termination was avoidance of the elective share.

2. A distribution from a trust is not subject to this subsection if the distribution is required by the terms of the governing instrument unless the event triggering the distribution is determined by reference to the death of the decedent and the court finds that a principal purpose of the terms of the governing instrument relating to the distribution is avoidance of the elective share.

~~(10)(9)~~ Property transferred in satisfaction of the elective share.

Section 3. Paragraph (i) of subsection (1) of section 732.2045, Florida Statutes, is amended to read:

732.2045 Exclusions and overlapping application.—

(1) EXCLUSIONS.—Section 732.2035 does not apply to:

(i) Property which constitutes the protected homestead of the decedent if the surviving spouse validly waived his or her homestead rights as provided under s. 732.702, or otherwise under applicable law, and such spouse did not receive any interest in the protected homestead upon the decedent’s death whether held by the decedent or by a trust at the decedent’s death.

Section 4. Section 732.2055, Florida Statutes, is amended to read:

732.2055 Valuation of the elective estate.—For purposes of s. 732.2035, “value” means:

(1)(a) In the case of protected homestead:

1. If the surviving spouse receives a fee simple interest, the fair market value of the protected homestead on the date of the decedent’s death.

2. If the spouse takes a life estate as provided in s. 732.401(1), or validly elects to take an undivided one-half interest as a tenant in common as provided in s. 732.401(2), one-half of the fair market value of the protected homestead on the date of the decedent’s death.

3. If the surviving spouse validly waived his or her homestead rights as provided under s. 732.702 or otherwise under applicable law, but nevertheless receives an interest in the protected homestead, other than an interest described in s. 732.401, including an interest in trust, the value of the spouse’s interest is determined as property interests that are not protected homestead.

(b) For purposes of this subsection, fair market value shall be calculated by deducting from the total value of the property all mortgages, liens, and security interests to which the protected homestead is subject and for which the decedent is liable, but only to the extent that such amount is not otherwise deducted as a claim paid or payable from the elective estate.

(2) In the case of any policy of insurance on the decedent’s life includable under s. 732.2035(5), (6), or (7) s. ~~732.2035(4), (5), or (6)~~, the net cash surrender value of the policy immediately before the decedent’s death.

(3)(2) In the case of any policy of insurance on the decedent’s life includable under s. 732.2035(9) s. ~~732.2035(8)~~, the net cash surrender value of the policy on the date of the termination or transfer.

(4)(3) In the case of amounts includable under s. 732.2035(8) s. ~~732.2035(7)~~, the transfer tax value of the amounts on the date of the decedent’s death.

~~(5)(4)~~ In the case of other property included under s. 732.2035(9) ~~s. 732.2035(8)~~, the fair market value of the property on the date of the termination or transfer, computed after deducting any mortgages, liens, or security interests on the property as of that date.

~~(6)(5)~~ In the case of all other property, the fair market value of the property on the date of the decedent's death, computed after deducting from the total value of the property:

(a) All claims paid or payable from the elective estate; and

(b) To the extent they are not deducted under paragraph (a), all mortgages, liens, or security interests on the property.

Section 5. Paragraph (b) of subsection (1), paragraph (b) of subsection (2), and paragraph (c) of subsection (3) of section 732.2075, Florida Statutes, are amended to read:

732.2075 Sources from which elective share payable; abatement.—

(1) Unless otherwise provided in the decedent's will or, in the absence of a provision in the decedent's will, in a trust referred to in the decedent's will, the following are applied first to satisfy the elective share:

(b) To the extent paid to or for the benefit of the surviving spouse, amounts payable under any plan or arrangement described in s. 732.2035(8) ~~s. 732.2035(7)~~.

(2) If, after the application of subsection (1), the elective share is not fully satisfied, the unsatisfied balance shall be allocated entirely to one class of direct recipients of the remaining elective estate and apportioned among those recipients, and if the elective share amount is not fully satisfied, to the next class of direct recipients, in the following order of priority, until the elective share amount is satisfied:

(b) *Class 2.*—Recipients of property interests, other than protected charitable interests, included in the elective estate under s. 732.2035(3), (4), or (7) ~~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(6) and (8) ~~s. 732.2035(5) and (7)~~.

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.

(3) If, after the application of subsections (1) and (2), the elective share amount is not fully satisfied, the additional amount due to the surviving spouse shall be determined and satisfied as follows:

(c) If there is more than one trust to which this subsection could apply, unless otherwise provided in the decedent’s will or, in the absence of a provision in the decedent’s will, in a trust referred to in the decedent’s will, the unsatisfied balance shall be apportioned pro rata to all such trusts in proportion to the value, as determined under ~~s. 732.2095(2)(f) s. 732.2095(2)(d)~~, of the surviving spouse’s beneficial interests in the trusts.

Section 6. Paragraph (a) of subsection (3) of section 732.2085, Florida Statutes, is amended to read:

732.2085 Liability of direct recipients and beneficiaries.—

(3) If a person pays the value of the property on the date of a sale or exchange or contributes all of the property received, as provided in paragraph (2)(b):

(a) No further contribution toward satisfaction of the elective share shall be required with respect to that property. However, if a person’s required contribution is not fully paid by 2 years after the date of the death of the decedent, such person must also pay interest at the statutory rate on any portion of the required contribution that remains unpaid.

Section 7. Section 732.2095, Florida Statutes, is amended to read:

732.2095 Valuation of property used to satisfy elective share.—

(1) DEFINITIONS.—As used in this section, the term:

(a) “Applicable valuation date” means:

1. In the case of transfers in satisfaction of the elective share, the date of the decedent’s death.
2. In the case of property held in a qualifying special needs trust on the date of the decedent’s death, the date of the decedent’s death.
3. In the case of other property irrevocably transferred to or for the benefit of the surviving spouse during the decedent’s life, the date of the transfer.
4. In the case of property distributed to the surviving spouse by the personal representative, the date of distribution.
5. Except as provided in subparagraphs 1., 2., and 3., in the case of property passing in trust for the surviving spouse, the date or dates the trust is funded in satisfaction of the elective share.
6. In the case of property described in ~~s. 732.2035(2), (3), or (4) s. 732.2035(2) or (3)~~, the date of the decedent’s death.
7. In the case of proceeds of any policy of insurance payable to the surviving spouse, the date of the decedent’s death.

8. In the case of amounts payable to the surviving spouse under any plan or arrangement described in s. 732.2035(8) ~~s. 732.2035(7)~~, the date of the decedent's death.

9. In all other cases, the date of the decedent's death or the date the surviving spouse first comes into possession of the property, whichever occurs later.

(b) "Qualifying power of appointment" means a general power of appointment that is exercisable alone and in all events by the decedent's spouse in favor of the spouse or the spouse's estate. For this purpose, a general power to appoint by will is a qualifying power of appointment if the power may be exercised by the spouse in favor of the spouse's estate without the consent of any other person.

(c) "Qualifying invasion power" means a power held by the surviving spouse or the trustee of an elective share trust to invade trust principal for the health, support, and maintenance of the spouse. The power may, but need not, provide that the other resources of the spouse are to be taken into account in any exercise of the power.

(2) Except as provided in this subsection, the value of property for purposes of s. 732.2075 is the fair market value of the property on the applicable valuation date.

(a) If the surviving spouse has a life interest in property not in trust that entitles the spouse to the use of the property for life, including, without limitation, a life estate in protected homestead as provided in s. 732.401(1), the value of the spouse's interest is one-half of the value of the property on the applicable valuation date.

(b) If the surviving spouse elects to take an undivided one-half interest in protected homestead as a tenant in common as provided in s. 732.401(2), the value of the spouse's interest is one-half of the value of the property on the applicable valuation date.

(c) If the surviving spouse validly waived his or her homestead rights as provided in s. 732.702 or otherwise under applicable law but nevertheless receives an interest in protected homestead, other than an interest described in s. 732.401, including, without limitation, an interest in trust, the value of the spouse's interest is determined as property interests that are not protected homestead.

~~(d)(b)~~ If the surviving spouse has an interest in a trust, or portion of a trust, which meets the requirements of an elective share trust, the value of the spouse's interest is a percentage of the value of the principal of the trust, or trust portion, on the applicable valuation date as follows:

1. One hundred percent if the trust instrument includes both a qualifying invasion power and a qualifying power of appointment.

2. Eighty percent if the trust instrument includes a qualifying invasion power but no qualifying power of appointment.

3. Fifty percent in all other cases.

(e)(e) If the surviving spouse is a beneficiary of a trust, or portion of a trust, which meets the requirements of a qualifying special needs trust, the value of the principal of the trust, or trust portion, on the applicable valuation date.

(f)(d) If the surviving spouse has an interest in a trust that does not meet the requirements of either an elective share trust or a qualifying special needs trust, the value of the spouse’s interest is the transfer tax value of the interest on the applicable valuation date; however, the aggregate value of all of the spouse’s interests in the trust shall not exceed one-half of the value of the trust principal on the applicable valuation date.

(g)(e) In the case of any policy of insurance on the decedent’s life the proceeds of which are payable outright or to a trust described in paragraph (d)(b), paragraph (e)(e), or paragraph (f)(d), the value of the policy for purposes of s. 732.2075 and paragraphs (d), (e), and (f) ~~(b)~~, ~~(e)~~, and ~~(d)~~ is the net proceeds.

(h)(f) In the case of a right to one or more payments from an annuity or under a similar contractual arrangement or under any plan or arrangement described in s. 732.2035(8) ~~s. 732.2035(7)~~, the value of the right to payments for purposes of s. 732.2075 and paragraphs (d), (e), and (f) ~~(b)~~, ~~(e)~~, and ~~(d)~~ is the transfer tax value of the right on the applicable valuation date.

Section 8. Section 732.2115, Florida Statutes, is amended to read:

732.2115 Protection of payors and other third parties.—Although a property interest is included in the decedent’s elective estate under s. 732.2035(3)-(9) ~~s. 732.2035(2)-(8)~~, a payor or other third party is not liable for paying, distributing, or transferring the property to a beneficiary designated in a governing instrument, or for taking any other action in good faith reliance on the validity of a governing instrument.

Section 9. Section 732.2135, Florida Statutes, is amended to read:

732.2135 Time of election; extensions; withdrawal.—

(1) Except as provided in subsection (2), the election must be filed on or before the earlier of the date that is 6 months after the date of service of a copy of the notice of administration on the surviving spouse, or an attorney in fact or guardian of the property of the surviving spouse, or the date that is 2 years after the date of the decedent’s death.

(2) Within the period provided in subsection (1), or 40 days after the date of termination of any proceeding which affects the amount the spouse is entitled to receive under s. 732.2075(1), whichever is later, but no more than

2 years after the decedent's death, the surviving spouse or an attorney in fact or guardian of the property of the surviving spouse may petition the court for an extension of time for making an election. For good cause shown, the court may extend the time for election. If the court grants the petition for an extension, the election must be filed within the time allowed by the extension.

(3) The surviving spouse or an attorney in fact, guardian of the property, or personal representative of the surviving spouse may withdraw an election at any time within 8 months after the decedent's death and before the court's order of contribution.

(4) A petition for an extension of the time for making the election or for approval to make the election shall toll the time for making the election.

~~(5) If the court determines that an election is made or pursued in bad faith, the court may assess attorney's fees and costs against the surviving spouse or the surviving spouse's estate.~~

Section 10. Subsection (1) of section 732.2145, Florida Statutes, is amended to read:

732.2145 Order of contribution; personal representative's duty to collect contribution.—

(1) The court shall determine the elective share and contribution. Any amount of the elective share not satisfied within 2 years of the date of death of the decedent shall bear interest at the statutory rate until fully satisfied, even if an order of contribution has not yet been entered. Contributions shall bear interest at the statutory rate beginning 90 days after the order of contribution. The order is prima facie correct in proceedings in any court or jurisdiction.

Section 11. Section 732.2151, Florida Statutes, is created to read:

732.2151 Award of fees and costs in elective share proceedings.—

(1) The court may award taxable costs as in chancery actions, including attorney fees, in any proceeding under this part in which there is an objection to or dispute over:

(a) The entitlement to or the amount of the elective share;

(b) The property interests included in the elective estate, or its value; or

(c) The satisfaction of the elective share.

(2) When awarding taxable costs or attorney fees, the court may do one or more of the following:

(a) Direct payment from the estate.

(b) Direct payment from a party's interest in the elective share or the elective estate.

(c) Enter a judgement that can be satisfied from other property of the party.

(3) In addition to any of the fees that may be awarded under subsections (1) and (2), if the personal representative does not file a petition to determine the amount of the elective share as required by the Florida Probate Rules, the electing spouse or the attorney in fact, guardian of the property, or personal representative of the electing spouse may be awarded from the estate reasonable costs, including attorney fees, incurred in connection with the preparation and filing of the petition.

(4) This section applies to all proceedings commenced on or after July 1, 2017, without regard to the date of the decedent's death.

Section 12. Subsection (1) of section 738.606, Florida Statutes, is amended to read:

738.606 Property not productive of income.—

(1) If a marital deduction under the Internal Revenue Code or comparable law of any state is allowed for all or part of a trust, or if assets are transferred to a trust that satisfies the requirements of s. 732.2025(2)(a) and (c), and such assets have been used in whole or in part to satisfy an election by a surviving spouse under s. 732.2125 and the income of which must be distributed to the grantor's spouse and the assets of which consist substantially of property that, in the aggregate, does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts the trustee transfers from principal to income under s. 738.104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, even though, in the case of an elective share trust, a marital deduction is not made or is only partially made, the spouse may require the trustee of such marital trust or elective share trust to make property productive of income, convert property within a reasonable time, or exercise the power conferred by ss. 738.104 and 738.1041. The trustee may decide which action or combination of actions to take.

Section 13. Applicability.—Except as otherwise provided in this act, the amendments made by this act apply to decedents whose death occurred on or after July 1, 2017.

Section 14. This act shall take effect July 1, 2017.

Approved by the Governor June 16, 2017.

Filed in Office Secretary of State June 16, 2017.