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To: Leadership of the Business Law Section of The Florida Bar

From: The Real Property Probate and Trust Law Section of The Florida Bar
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Re: Proposed Legislative Position regarding the Florida Uniform Disposition of Community Property Rights at Death Act (ss. 732.216-732.228) ("Act")

As you are aware, Standing Board Policy 9.50(d) requires voluntary bar groups to contact all divisions, sections and committees that might be interested in proposed legislative or political activity. The policy also requires sections to identify all groups to which proposals have been submitted for comment and to include comments when submitting the proposal.

We thought your section might be interested in the above issue and have attached a copy of our white paper and proposed bill for your review and comment. Our proposal is in support of legislation to (1) clarify existing Florida law by statutorily exempting title disputes arising under the Florida Uniform Disposition of Community Property Rights at Death Act (ss. 732.216-732.228) ("Act") from Florida's probate creditor claim procedures, (2) create a new dispute resolution mechanism and 2-year statute of repose specifically designed for title disputes arising under the Act, and (3) make targeted and narrowly focused modifications to the Act and other related provisions of the Florida Probate Code to improve clarity and reduce the risk of unintended forfeitures of the property rights the Act is intended to preserve.

Thank you for your consideration of this request. Please let us know if your section will provide comments.

Attachments:

1. White Paper
2. Proposed Bill

WHITE PAPER

The *Johnson v. Townsend* Fix Florida Uniform Disposition of Community Property Rights at Death Act (Sections 732.216-732.228, *Florida Statutes*)

I. SUMMARY

Florida is the first choice for relocating retirees within the U.S.,¹ the largest recipient of domestic state-to-state migration within the U.S.,² and the largest recipient of international migration to the U.S.³ Puerto Rico is the most populous U.S. territory,⁴ and Florida is the largest recipient of migrants to the mainland from Puerto Rico.⁵

In *Malleiro v. Mori*, the court observed that “Florida is already a global community and global marketplace. The people of Florida benefit from the way many citizens of distant states and countries visit, invest, and often stay to live out their golden years in Florida. Some are drawn by the comfort of Florida’s sunshine and coastlines. Others come for the security provided by our low tax economy in which the personal income tax is barred by our traditions and expressly by our Florida Constitution. We owe it to them to ensure that their testamentary intentions are strictly honored regarding the disposition of their Florida property.”⁶

In 1992, Florida’s legislature took an important step towards ensuring that the testamentary intentions of this state’s new residents are strictly honored, as applied to married couples relocating from community property jurisdictions, by adopting the Florida Uniform

¹ See Andy Markowitz, AARP, *Top 5 States Where Retirees Are Moving* (January 06, 2023), <https://www.aarp.org/retirement/planning-for-retirement/info-2023/most-popular-relocation-states.html>.

² See Wikipedia.org, *List of U.S. states and territories by net migration* (April 1, 2020 to July 1, 2022), https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_net_migration. See also Kristin Kerns and L. Slagan Locklear, U.S. Census Bureau, *Three New Census Bureau Products Show Domestic Migration at Regional, State, and County Levels* (April 29, 2019), <https://www.census.gov/library/stories/2019/04/moves-from-south-west-dominate-recent-migration-flows.html>.

³ See Wikipedia.org, *List of U.S. states and territories by net migration* (April 1, 2020 to July 1, 2022), https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_net_migration. See also Anthony Knapp, U.S. Census Bureau, *Net Migration between the U.S. and Abroad Added 595,000 to National Population Between 2018 and 2019* (December 30, 2019), <https://www.census.gov/library/stories/2019/12/net-international-migration-projected-to-fall-lowest-levels-this-decade.html>.

⁴ See World Population Review, *United States Territories 2023*, <https://worldpopulationreview.com/country-rankings/united-states-territories>.

⁵ See Brian Glassman, U.S. Census Bureau, *A Third of Movers from Puerto Rico to the Mainland United States Relocated to Florida in 2018* (September 26, 2019), <https://www.census.gov/library/stories/2019/09/puerto-rico-outmigration-increases-poverty-declines.html>.

⁶ *Malleiro v. Mori*, 182 So.3d 5, 11 (Fla. 3d DCA 2015).

Disposition of Community Property Rights at Death Act (sections 732.216-732.228, *Florida Statutes*) (the “Act”).⁷ In 2018, close to three decades after the Act was first adopted, a Florida appellate court for the first time ruled that Florida’s probate creditor claim procedures apply to title disputes arising under the Act, resulting in the unintended forfeiture of a surviving spouse’s property rights. *See Johnson v. Townsend*, 259 So.3d 851 (Fla. 4th DCA 2018).

The primary purpose of this legislation is twofold. First, it clarifies existing Florida law by statutorily exempting title disputes arising under the Act from Florida’s probate creditor claim procedures. Second, it creates a new dispute resolution mechanism and 2-year statute of repose specifically designed for title disputes arising under the Act.⁸

In addition to the foregoing, this legislation makes targeted and narrowly focused modifications to the Act and other related provisions of the Florida Probate Code to improve clarity and reduce the risk of unintended forfeitures of the property rights the Act is intended to preserve.

This legislation does not have a fiscal impact on state funds.

II. CURRENT SITUATION

A. The Purpose of the Florida Uniform Disposition of Community Property Rights at Death Act (“Act”)

In 1958, the U.S. Fifth Circuit Court of Appeals summarized the origins and basic principles of the community property system in a case involving Texas law:

The community property system comes from the custom of the women of the Visigoths and other Germanic tribes sharing the fighting and the spoils of war with their men; it owes its strength to the civilized view that marriage is a full partnership. Husband and wife are equal partners. Each has a present, vested half interest in all community property. All property accumulated during marriage is community property, unless it is received by gift, devise, or inheritance. ... Thus, on death or divorce the community is divided equally. Neither spouse has testamentary disposition over the other’s half of the community. The wife has

⁷ Florida’s Act, with some modifications, is based upon the Uniform Disposition of Community Property Rights at Death Act (“UDCPRDA”), <https://www.uniformlaws.org/viewdocument/act-1971>. The UDCPRDA was promulgated in 1971. The UDCPRDA was replaced in 2021 by the Uniform Community Property Disposition at Death Act (“UCPDDA”), <https://www.uniformlaws.org/committees/community-home?communitykey=425b0732-7ff0-4b28-ada1-fc2b4638f29e>. Florida has not adopted the UCPDDA.

⁸ A statute of repose “bar[s] actions by setting a time limit within which an action must be filed as measured from a specified act, after which time the cause of action is extinguished.” *Hess v. Philip Morris USA, Inc.*, 175 So.3d 687, 695 (Fla. 2015).

complete testamentary disposition over her half and may leave it even to her paramour.⁹

Domestically, “[t]he community property system has been adopted by nine states: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin. The U.S. Territories of Guam and Puerto Rico are also community property jurisdictions.”¹⁰ Approximately 30% of the U.S. population resides in one of our nine community property states, including our two most populous states (California and Texas).¹¹ Internationally, “[u]nder the law of ... most countries in continental Europe and virtually all countries in Latin America, spouses own property ‘in community’ unless they have expressly adopted another marital property regime such as separation of property.”¹²

A married couple’s community property estate is terminated in one of only two ways: death or divorce. By statute,¹³ as well as case law,¹⁴ Florida has categorically rejected all forms

⁹ *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231, 239 (5th Cir. 1958) (footnotes omitted).

¹⁰ See IRS, Internal Revenue Manuals (IRM) § 25.18.1.2.2 (03-04-2011), https://www.irs.gov/irm/part25/irm_25-018-001#idm140332604209888.

¹¹ See World Population Review, *US States - Ranked by Population 2020*, <http://worldpopulationreview.com/states>.

<u>Community property states</u>	<u>2023 Population</u>
1. California	40,223,504
2. Texas	30,345,487
3. Washington	7,999,503
4. Arizona	7,379,346
5. Wisconsin	5,955,737
6. Louisiana	4,695,071
7. Nevada	3,225,832
8. New Mexico	2,135,024
9. Idaho	1,920,562
Total	103,880,066

Total 2023 U.S. Population: 339,172,809

$103,880,066 \div 339,172,809 = 30.63\%$.

¹² See Michael W. Galligan, *International Estate Planning for U.S. Citizens: An Integrated Approach*, Estate Planning, a Thomson Reuters publication (October 2009), <https://www.phillipsnizer.com/siteFiles/24533/International-Estate-Planning-for-U-S-Citizens-An-Integrated-Approach.pdf>.

¹³ “Title to disputed assets shall vest only by the judgment of a court. This section does not require the joinder of spouses in the conveyance, transfer, or hypothecation of a spouse’s individual property; affect the laws of descent and distribution; or establish community property in this state.” Fla. Stat. § 61.075(8) (emphasis added).

¹⁴ See *Estabrook v. Wise*, 348 So.2d 355 (Fla. 1st DCA), cert. denied, 354 So.2d 980 (Fla. 1977), cert. denied, 435 U.S. 971, 98 S.Ct. 1612, 56 L.Ed.2d 63 (1978) (“Florida is not a community property state, and thus is not required to recognize an encumbrance predicated upon a foreign state’s community property law. The establishment of non-record title interests arising out of marital claims should be settled in the forum state.”); *Green v. Green*, 442 So.2d 354, 355 (Fla. 1st DCA 1983) (“Florida is not a community property state ...”); *Herrera v. Herrera*, 673 So.2d 143, 144 (Fla. 5th DCA 1996) (“Florida is not a community property state.”)

of community property rights in divorce proceedings. However, previously acquired community property rights are in practice largely preserved in Florida divorce proceedings because Florida law suggests “that equal or 50/50 is the proper starting point in making an equitable distribution of marital assets,”¹⁵ regardless of whose name the asset is titled in.¹⁶

Florida’s approach regarding testamentary community property rights is distinctly different. Under long-established common law spouses relocating to Florida from community-property jurisdictions retain their testamentary rights in property that was community property prior to their change of domicile (as well as in property substituted therefor).¹⁷ This conflict-of-laws rule is known as “partial mutability,” which for “nearly 200 years [has been] the prevailing doctrine in the United States.”¹⁸ In 1992, Florida’s legislature both simplified and codified this pre-existing common law by adopting the Act.

The purpose of the Act is to statutorily preserve the testamentary “rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their ‘community’ rights. It thus follows the typical pattern of community property which permits the deceased spouse to dispose of ‘his half’ of the community property, while confirming the title of the surviving spouse in ‘her half.’”¹⁹

¹⁵ *Herrera*, 673 So.2d at 144. *See also* Fla. Stat. § 61.075(1) (“In a proceeding for dissolution of marriage ... the court shall set apart to each spouse that spouse’s nonmarital assets and liabilities, and in distributing the marital assets and liabilities between the parties, *the court must begin with the premise that the distribution should be equal*, unless there is a justification for an unequal distribution based on all relevant factors ...”) (Emphasis added.)

¹⁶ *See* Fla. Stat. § 61.075(6)(a)1.a. (“Marital assets and liabilities” include: *Assets acquired* and liabilities incurred *during the marriage*, individually *by either spouse* or jointly by them.) (Emphasis added.)

¹⁷ *See* Restatement (First) of Conflict of Laws § 292 (1934). *Movables Held in Community Taken into Another State* (“Movables held by spouses in community continue to be held in community when taken into a state which does not create community interests.”) *See also Quintana v. Ordonez*, 195 So.2d 577, 579-580 (Fla. 3d DCA 1967) (Wife’s vested interest in property acquired while domiciled in Cuba under community property law was not affected by subsequent change of domicile to Florida, a noncommunity property state.)

¹⁸ *See* Jeffrey Schoenblum, *U.S. Conflict of Laws Involving International Estates and Marital Property: A Critical Analysis of Estate of Charania v. Shulman*, 103 Iowa L. Rev. 2119, 2121 (2018) (“For nearly 200 years, the prevailing doctrine in the United States has been ‘partial mutability.’ Under this conflict-of-laws rule, the right of a spouse in a movable asset acquired during marriage is determined by the law of the state in which the spouses had their marital domicile at the time of the acquisition of the asset. Thus, if the spouses change their marital domicile during the marriage, it is entirely possible that different movable assets will be governed by different laws. This conflict-of-laws rule is widely known as ‘partial mutability’ because the law of the original marital domicile does not remain the governing law as to assets acquired after a change in marital domicile has taken place. In other words, there is ‘mutability.’ However, it is only ‘partial’ because with respect to rights acquired at a particular marital domicile, they are not mutable and are not lost simply by moving to a new marital domicile that does not recognize those spousal rights.”) (Citing *Saul v. His Creditors*, 5 Mart. (n.s.) 569, 603-08 (La. 1827)).

¹⁹ *See* Uniform Disposition of Community Property Rights at Death Act (UDCPRDA), *Prefatory Note*, <https://www.uniformlaws.org/viewdocument/act-1971>. *See also* § 732.219, Fla. Stat. (2023) (“Disposition upon death.—Upon the death of a married person, one-half of the property to which ss. 732.216-732.228 apply is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under

B. *Johnson v. Townsend*

In 2018, close to three decades after the Act was first adopted, a Florida appellate court for the first time ruled that Florida’s probate creditor claim procedures apply to title disputes arising under the Act, resulting in the unintended forfeiture of a surviving spouse’s property rights. *See Johnson v. Townsend*, 259 So.3d 851 (Fla. 4th DCA 2018). The *Johnson* court held that a surviving spouse’s attempt to confirm her pre-existing right to “her half” of property to which the Act applies is a form of probate creditor “claim,” as that term is defined in section 731.201(4), *Florida Statutes*, and thus subject to the limitations period applicable to creditor claims found in section 733.702(1), *Florida Statutes*, and the 2-year statute of repose applicable to creditor claims found in section 733.710(1), *Florida Statutes*.

Nowhere within the text of the Act or any other provision of the Florida Probate Code is it stated that Florida’s probate creditor claim procedures apply to title disputes arising under the Act, nor does such application comport with the Act’s existing statutory scheme, which explicitly states that one-half of the property to which the Act applies – regardless of who holds title – does not belong to the decedent but is instead the property of the surviving spouse.

Disposition upon death.—Upon the death of a married person, one-half of the property to which ss. 732.216-732.228 apply **is the property of the surviving spouse** and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this state. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this state. The decedent’s one-half of that property is not in the elective estate.

See § 732.219, Fla. Stat. (2023) (emphasis added).

The effectiveness of the Act is diminished by the uncertainties created by the *Johnson* court’s ruling, which for the first time applied Florida’s probate creditor claim procedures to title disputes arising under the Act, resulting in the unintended forfeiture of a surviving spouse’s property rights.

III. EFFECT OF PROPOSED CHANGES

The proposed changes: (1) clarify existing Florida law by exempting title disputes arising under the Act from the term “claim,” as defined in section 731.201(4), *Florida Statutes*, the limitations period applicable to probate creditor claims found in section 733.702(1), *Florida Statutes*, and the 2-year statute of repose applicable to probate creditor claims found in section 733.710(1), *Florida Statutes*; (2) create a new dispute resolution mechanism and 2-year statute of repose specifically designed for title disputes arising

the laws of succession of this state. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this state.”)

under the Act; and (3) make targeted and narrowly focused modifications to the Act and other related provisions of the Florida Probate Code to improve clarity and reduce the risk of unintended forfeitures of the property rights the Act is intended to preserve.

SECTION-BY-SECTION ANALYSIS

A. Section 732.217

Current Situation: Property held as tenants by the entirety and homestead property is not property to which the Act applies.

Effect of Proposed Changes: The legislation clarifies existing Florida law by amending the text of section 732.217, *Florida Statutes*, by adding the new underlined text below:

732.217 Application.—Sections 732.216-732.228 apply to the disposition at death of the following property acquired by a married person:

(1) Personal property, except personal property held as tenants by the entirety, wherever located, which: (a) Was acquired as, or became and remained, community property under the laws of another jurisdiction; (b) Was acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, community property; or (c) Is traceable to that community property.

(2) Real property, except homestead and real property held as tenants by the entirety, which is located in this state, and which: (a) Was acquired with the rents, issues, or income of, the proceeds from, or in exchange for, property acquired as, or which became and remained, community property under the laws of another jurisdiction; or (b) Is traceable to that community property.

B. Section 732.218

Current Situation: The text of section 732.218, *Florida Statutes*, currently contains a double negative.

Effect of Proposed Changes: The legislation clarifies existing Florida law by amending the text of section 732.218, *Florida Statutes*, by striking the text below:

732.218 Rebuttable presumptions.—In determining whether ss. 732.216-732.228 apply to specific property, the following rebuttable presumptions apply:

(1) Property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as, or to have become and remained, property to which these sections apply.

(2) Real property located in this state, ~~other than homestead and real property held as tenants by the entirety,~~ and personal property wherever located acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property and title to which was taken in a form which created rights of survivorship are presumed to be property to which these sections do not apply.

C. Section 732.219

Current Situation: The effectiveness of the Act is diminished by the uncertainties created by the *Johnson* court's ruling, which resulted in the unintended forfeiture of a surviving spouse's property rights.

Effect of Proposed Changes: The legislation clarifies existing Florida law and reduces the risk of unintended forfeitures of the property rights the Act is intended to preserve by amending the text of section 732.219, *Florida Statutes*, by adding the new underlined text below:

732.219 Disposition upon death; waiver.—

(1) Upon the death of a married person, one-half of the property to which ss. 732.216-732.228 apply is the property of the surviving spouse, and is not property of the decedent's probate estate, and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this state. One-half of that property is the property of the decedent's probate estate and is subject to testamentary disposition or distribution under the laws of succession of this state. The decedent's one-half of that property is not in the elective estate. For purposes of this section, the term "probate estate" means all property wherever located that is subject to estate administration in any state of the United States or in the District of Columbia.

(2) If not previously waived pursuant to s. 732.702, subsequent to the decedent's death a surviving spouse or any person acting on behalf of a surviving spouse, including, but not limited to, an attorney in fact, agent, guardian of the property, or personal representative of the surviving spouse, may at any time waive the surviving spouse's right to assert a claim to any right, title or interest in any property held by the decedent at the time of the decedent's death arising under ss. 732.216-732.228, wholly or partly, by a written contract, agreement, or waiver, signed by the waiving party, if the following or substantially similar language is included in the contract, agreement, or waiver:

"By executing this contract, agreement, or waiver, I intend to waive my right as a surviving spouse to assert a claim to any right, title or interest in property held by the decedent at the time of the decedent's death arising under

the Florida Uniform Disposition of Community Property Rights at Death Act (ss. 732.216-732.228), wholly or partly, as provided herein.”

D. Section 732.221

Current Situation: The effectiveness of the Act is diminished by the uncertainties created by the *Johnson* court’s ruling, which resulted in the unintended forfeiture of a surviving spouse’s property rights.

Effect of Proposed Changes: The legislation clarifies existing Florida law by exempting title disputes arising under the Act from the term “claim,” as defined in section 731.201(4), *Florida Statutes*, the limitations period applicable to probate creditor claims found in section 733.702(1), *Florida Statutes*, and the 2-year statute of repose applicable to probate creditor claims found in section 733.710(1), *Florida Statutes*. The legislation also creates a new dispute resolution mechanism and 2-year statute of repose specifically designed for title disputes arising under the Act,²⁰ by deleting the existing text of section 732.221, *Florida Statutes*, and replacing it with the new underlined text below. The new statute of repose comports with the “announced public policy of this state which requires that estates of decedents be speedily and finally determined.”²¹ Finally, in new subsection (b) below, the legislation preserves the existing protections for personal representatives under the Act.

732.221 Demands or disputes; 2-year statute of repose.—

(1) Demands or disputes regarding any right, title or interest in any property held by the decedent or the decedent’s surviving spouse at the time of the decedent’s death arising under ss. 732.216-732.228, wholly or partly, shall be determined in a declaratory action commenced within 2 years after the decedent’s death, or be forever barred. A declaratory action instituted pursuant to this section shall be commenced by filing a complaint and shall be governed by the rules of civil procedure. A declaratory action instituted pursuant to this section is not a claim, as such term is defined in s. 731.201. Nothing in s. 733.702 shall require the filing of a statement of claim in the estate of the decedent as a condition precedent to instituting a declaratory action pursuant to this section. Section 733.710 shall not apply to a declaratory action instituted pursuant to this section.

(2) The personal representative or curator has no duty to discover whether any property held by the decedent or the decedent’s surviving spouse at the time of the decedent’s death is property to which ss. 732.216-732.228 apply, or may apply, unless a written demand is made by the surviving spouse or a beneficiary

²⁰ A statute of repose “bar[s] actions by setting a time limit within which an action must be filed as measured from a specified act, after which time the cause of action is extinguished.” *Hess v. Philip Morris USA, Inc.*, 175 So.3d 687, 695 (Fla. 2015).

²¹ *In re Estate of Gay*, 294 So.2d 668, 670 (Fla. 4th DCA 1974).

within 6 months after service of a copy of the notice of administration on the surviving spouse or beneficiary, or by a creditor on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor.

(3) The declaratory action authorized by this section is extinguished if not commenced prior to expiration of the 2-year statute of repose period set forth in subsection (1). The rights of any person interested as or through a party that fails to commence a timely declaratory action pursuant to this section are forfeit, and the decedent's surviving spouse, personal representative or curator and any other person or entity that at any time is in possession of any property to which ss. 732.216-732.228 apply, or may apply, shall not be subject to liability for any such forfeit rights, and the decedent's personal representative or curator may distribute the assets of the decedent's estate without liability for any such forfeit rights.

(4) Nothing in this section shall restrict the bringing of a quiet title or declaratory action regarding any right, title or interest in any property held by the decedent or the decedent's surviving spouse at the time of the decedent's death as to issues or matters not arising under ss. 732.216-732.228, wholly or partly.

E. Section 732.223

Current Situation: The Act is silent regarding protections for third parties transferring property subject to the Act.

Effect of Proposed Changes: The legislation establishes new protections for third parties transferring property subject to the Act by deleting the existing text of section 732.223, *Florida Statutes*, and replacing it with the new underlined text below:

732.223 Protection of payors and other third parties.—

(1) Although a property interest is subject to property rights under ss. 732.216-732.228, 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.

(2) As used in this section the term:

(a) "Governing instrument" means a deed; will; trust; insurance or annuity policy; account with payable-on-death designation; security registered in beneficiary form (TOD); pension, profit-sharing, retirement, or similar benefit plan; an instrument creating or exercising a power of appointment or a

power of attorney; or a dispositive, appointive, or nominative instrument of any similar type.

(b) “Payor” means the decedent’s personal representative, a trustee of a trust created by the decedent, an insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

(c) “Person” includes an individual, trust, estate, partnership, association, company, or corporation.

F. Section 732.225

Current Situation: Property held as tenants by the entirety is not property to which the Act applies.

Effect of Proposed Changes: The legislation clarifies existing Florida law by amending the text of section 732.225, *Florida Statutes*, by adding the new underlined text below:

732.225 Acts of married persons.—Sections 732.216-732.228 do not prevent married persons from severing or altering their interests in property to which these sections apply. The reinvestment of any property to which these sections apply in real property located in this state which is or becomes homestead property or real or personal property held as tenants by the entirety creates a conclusive presumption that the spouses have agreed to terminate the community property attribute of the property reinvested.

G. Section 732.702

Current Situation: Section 732.702(1), *Florida Statutes*, is silent regarding the procedures for a spouse, during a spouse’s lifetime, to waive rights to property to which the Act applies.

Effect of Proposed Changes: The legislation clarifies existing Florida law by amending the text of section 732.702(1), *Florida Statutes*, by adding the new underlined text below:

732.702 Waiver of spousal rights.—

(1) The rights of a surviving spouse to an elective share, intestate share, pretermitted share, homestead, to assert a claim under the Florida Uniform Disposition of Community Property Rights at Death Act (ss. 732.216-732.228), exempt property, family allowance, and preference in appointment as personal representative of an intestate estate or any of those rights, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses. The requirement of witnesses shall be applicable only to contracts,

agreements, or waivers signed by Florida residents after the effective date of this law. Any contract, agreement, or waiver executed by a nonresident of Florida, either before or after this law takes effect, is valid in this state if valid when executed under the laws of the state or country where it was executed, whether or not he or she is a Florida resident at the time of death. Unless the waiver provides to the contrary, a waiver of “all rights,” or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead, to assert a claim under the Florida Uniform Disposition of Community Property Rights at Death Act (ss. 732.216-732.228), exempt property, family allowance, and preference in appointment as personal representative of an intestate estate, by the waiving party in the property of the other and a renunciation by the waiving party of all benefits that would otherwise pass to the waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver.

H. Section 733.212

Current Situation: A notice of administration currently provides no notice of the deadlines triggered under the Act upon receipt of service of a notice of administration.

Effect of Proposed Changes: The legislation provides notice of the deadlines triggered under the Act upon receipt of service of a notice of administration by adding the new underlined text below:

733.212 Notice of administration; filing of objections.—

...

(2) The notice shall state:

...

(g) That, the personal representative or curator has no duty to discover whether any property held by the decedent or the decedent’s surviving spouse at the time of the decedent’s death is property to which the Florida Uniform Disposition of Community Property Rights at Death Act (ss. 732.216-732.228) applies, or may apply, unless a written demand is made by the surviving spouse or a beneficiary during the time period set forth in s. 732.221.

I. Section 733.2121

Current Situation: A notice to creditors currently provides no notice of the deadlines triggered under the Act upon receipt of service of a notice to creditors.

Effect of Proposed Changes: The legislation provides notice of the deadlines triggered under the Act upon receipt of service of a notice to creditors by adding the new underlined text below:

733.2121 Notice to creditors; filing of claims.—

(1) Unless creditors' claims are otherwise barred by s. 733.710, the personal representative shall promptly publish a notice to creditors. The notice shall contain the name of the decedent, the file number of the estate, the designation and address of the court in which the proceedings are pending, the name and address of the personal representative, the name and address of the personal representative's attorney, and the date of first publication. The notice shall state that creditors must file claims against the estate with the court during the time periods set forth in s. 733.702, or be forever barred. The notice shall state that a personal representative or curator has no duty to discover whether any property held by the decedent or the decedent's surviving spouse at the time of the decedent's death is property to which the Florida Uniform Disposition of Community Property Rights at Death Act (ss. 732.216-732.228) applies, or may apply, unless a written demand is made by a creditor during the time period set forth in s. 732.221.

J. Section 733.607

Current Situation: In light of the court's holding in *Johnson v. Townsend*, there is uncertainty regarding whether a surviving spouse's one-half share of property to which the Act applies is subject to administration in the decedent's probate estate. This uncertainty is contrary to the Act's existing statutory scheme, which explicitly states that one-half of the property to which the Act applies does not belong to the decedent but is instead the property of the surviving spouse.²²

Effect of Proposed Changes: The legislation clarifies existing Florida law by amending the text of section 733.607(1), *Florida Statutes*, by adding the new underlined text below:

733.607 Possession of estate.—

(1) Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except the protected homestead, but any real property or tangible personal property may be left with, or surrendered to, the person presumptively entitled to it unless possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by a beneficiary is conclusive evidence that the possession of the property by the personal representative is necessary for the purposes of administration, in any action against the beneficiary for possession of it. The personal representative shall

²² See § 732.219, Fla. Stat. (2023) ("Disposition upon death.—Upon the death of a married person, one-half of the property to which ss. 732.216-732.228 apply is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this state. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this state. The decedent's one-half of that property is not in the elective estate.")

take all steps reasonably necessary for the management, protection, and preservation of the estate until distribution and may maintain an action to recover possession of property or to determine the title to it. Notwithstanding anything in this section to the contrary, the personal representative has no right to, and shall not knowingly take possession or control of, a surviving spouse's one-half share of property to which the Florida Uniform Disposition of Community Property Rights at Death Act (ss. 732.216-732.228) applies.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

None.

VI. CONSTITUTIONAL ISSUES

The “announced public policy of this state . . . requires that estates of decedents be speedily and finally determined.”²³ To that end this legislation creates a new dispute resolution mechanism and 2-year statute of repose specifically designed for title disputes arising under the Act.²⁴

To the extent these changes result in the forfeiture of pre-existing testamentary property rights, they are a valid and constitutional exercise of Florida’s police power in service of a legitimate and reasonably related public policy favoring the speedy and final determination of estate proceedings.²⁵

As noted in *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So.2d 64 (Fla.1990), decisions in Florida and in other jurisdictions historically recognized a distinction in the protections to be afforded to property rights versus those afforded to testamentary rights. “The distinction those courts have drawn is that property rights are inalienable rights grounded in natural law, whereas freedom of testation is purely a creation of statute that did not exist at common law.” *Id.* at 67; *see also* Evin Netzer, *Florida Constitutional Law: Demise of the Common Law Distinction Between Testamentary and Property Rights*, 43 Fla. L.Rev. 153, 156 (Jan. 1991) (“[C]ourts historically have viewed

²³ *In re Estate of Gay*, 294 So.2d 668, 670 (Fla. 4th DCA 1974).

²⁴ A statute of repose “bar[s] actions by setting a time limit within which an action must be filed as measured from a specified act, after which time the cause of action is extinguished.” *Hess v. Philip Morris USA, Inc.*, 175 So.3d 687, 695 (Fla. 2015).

²⁵ *See In re Estate of Magee*, 988 So.2d 1 (Fla. 1st DCA 2007) (Elective share statute, in permitting a decedent’s spouse to accept a statutory share, rather than a testamentary share, of decedent’s estate, was rationally related to the legitimate legislative purpose of safeguarding the public welfare, and thus, did not violate the state constitutional provision protecting possession of property.)

testamentary rights as emanating from the legislature, and other real property rights as being fundamental.”).

In *Zrillic*, however, the Florida Supreme Court rejected this dichotomy as arising from “long-abandoned feudal notions of property” and concluded that the testamentary disposition of property was “a specifically expressed [Florida] constitutional property right.” *Zrillic*, 563 So.2d at 67–68. The court thus afforded testamentary rights the same constitutional protections normally provided to other real property rights.

...

Fortunately, the Florida Supreme Court has recently clarified that the test to be applied in evaluating statutes and regulations that infringe on property rights or testamentary rights—at least those that do not require the absolute destruction of property—is not the “least restrictive means” test urged by Judith here, but rather a “reasonable relationship” test. In *Haire v. Florida Department of Agriculture & Consumer Services*, 870 So.2d 774, 783 (Fla.2004), the court explained,

[W]e have held that “[a]ll ... *property rights* are held subject to the fair exercise of the [police] power,” *Golden v. McCarty*, 337 So.2d 388, 390 (Fla.1976) (emphasis supplied), and have used the reasonable relationship test ... to evaluate statutes and regulations that infringe on property rights.

Id. (footnotes omitted).

...

As further explained in *Haire*,

Under this standard of review ... a “state statute must be upheld ... if there is any reasonable relationship between the act and the furtherance of a valid governmental objective.” *Lane v. Chiles*, 698 So.2d 260, 262 (Fla.1997) (emphasis supplied). Specifically, with respect to substantive due process, a statute is valid if it “bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory, arbitrary, or oppressive.” *Chicago Title Ins. Co. v. Butler*, 770 So.2d 1210, 1215 (Fla.2000).

870 So.2d at 782.²⁶

VII. OTHER INTERESTED PARTIES

None.

²⁶ *In re Estate of Magee* at 3 & 5 (emphasis in original).

1 A bill to be entitled

2 An amendment to Section 732.217 (1) and (2) Florida
3 Statutes clarifying existing law; an amendment to Section
4 732.218 Florida Statutes clarifying existing law; an
5 amendment to Section 732.219, Florida Statutes confirming
6 that the surviving spouse's interest in property subject to
7 ss. 732.216-732.228, Florida Statutes is not subject to
8 administration in the decedent's probate estate and
9 establishing a procedure and deadline for a surviving spouse
10 to waive rights to property subject to ss. 732.216-732.228,
11 Florida Statutes; replacement of Section 732.221, Florida
12 Statutes establishing procedures and deadlines for
13 determining title to property subject to ss. 732.216-732.228,
14 Florida Statutes; replacement of Section 732.223, Florida
15 Statutes establishing protections for third parties
16 transferring property subject to ss. 732.216-732.228, Florida
17 Statutes; an amendment to Section 732.225 Florida Statutes
18 clarifying existing law; an amendment to Section 732.702 (1),
19 Florida Statutes establishing procedures for a spouse, during
20 a spouse's lifetime, to waive rights under ss. 732.216-
21 732.228, Florida Statutes; an amendment to Section 733.212,
22 Florida Statutes adding language to the notice of
23 administration regarding the duty of the personal
24 representative to discover property subject to ss. 732.216-
25 732.228, Florida Statutes; an amendment to Section 733.2121,
26 Florida Statutes adding language to the notice to creditors
27 regarding the duty of the personal representative to discover
28 property subject to ss. 732.216-732.228, Florida Statutes; an
29 amendment to Section 733.607, Florida Statutes confirming
30 that the surviving spouse's interest in property subject to
31 ss. 732.216-732.228, Florida Statutes is not subject to
32 administration in the deceased spouse's probate estate.

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

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34 Section 1. Section 732.217 (1) and (2), Florida
35 Statutes, are revised to read:

36 (1) Personal property, except personal property held
37 as tenants by the entirety, wherever located, which: (a) Was
38 acquired as, or became and remained, community property under
39 the laws of another jurisdiction; (b) Was acquired with the
40 rents, issues, or income of, or the proceeds from, or in
41 exchange for, community property; or (c) Is traceable to that
42 community property.

43 (2) Real property, except homestead and real property
44 held as tenants by the entirety, which is located in this
45 state, and which: (a) Was acquired with the rents, issues,
46 or income of, the proceeds from, or in exchange for, property
47 acquired as, or which became and remained, community property
48 under the laws of another jurisdiction; or (b) Is traceable
49 to that community property.

50 Section 2. Section 732.218(2), Florida Statutes, is
51 revised to read:

52 (2) Real property located in this state, ~~other than~~
53 ~~homestead and real property held as tenants by the entirety,~~
54 and personal property wherever located acquired by a married
55 person while domiciled in a jurisdiction under whose laws
56 property could not then be acquired as community property and
57 title to which was taken in a form which created rights of
58 survivorship are presumed to be property to which these
59 sections do not apply.

60 Section 3. Section 732.219, Florida Statutes, is revised
61 to read:

62 732.219 Disposition upon death; waiver.-

63 (1) Upon the death of a married person, one-half of
64 the property to which ss. 732.216-732.228 apply is the
65 property of the surviving spouse, ~~and~~ is not property of the
66 decedent's probate estate, and is not subject to testamentary

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67 disposition by the decedent or distribution under the laws of
68 succession of this state. One-half of that property is the
69 property of the decedent's probate estate and is subject to
70 testamentary disposition or distribution under the laws of
71 succession of this state. The decedent's one-half of that
72 property is not in the elective estate. For purposes of this
73 section, the term "probate estate" means all property
74 wherever located that is subject to estate administration in
75 any state of the United States or in the District of Columbia.

76 (2) If not previously waived pursuant to s. 732.702,
77 subsequent to the decedent's death a surviving spouse or any
78 person acting on behalf of a surviving spouse, including, but
79 not limited to, an attorney in fact, agent, guardian of the
80 property, or personal representative of the surviving spouse,
81 may at any time waive the surviving spouse's right to assert
82 a claim to any right, title or interest in any property held
83 by the decedent at the time of the decedent's death arising
84 under ss. 732.216-732.228, wholly or partly, by a written
85 contract, agreement, or waiver, signed by the waiving party,
86 if the following or substantially similar language is
87 included in the contract, agreement, or waiver:

88 "By executing this contract, agreement, or waiver, I
89 intend to waive my right as a surviving spouse to assert a
90 claim to any right, title or interest in property held by the
91 decedent at the time of the decedent's death arising under
92 the Florida Uniform Disposition of Community Property Rights
93 at Death Act (ss. 732.216-732.228), wholly or partly, as
94 provided herein."

95 Section 4. Section 732.221, Florida Statutes, is
96 repealed and replaced with the following:

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97 732.221 Demands or disputes; 2-year statute of
98 repose.-

99 (1) Demands or disputes regarding any right, title or
100 interest in any property held by the decedent or the
101 decedent's surviving spouse at the time of the decedent's
102 death arising under ss. 732.216-732.228, wholly or partly,
103 shall be determined in a declaratory action commenced within
104 2 years after the decedent's death, or be forever barred. A
105 declaratory action instituted pursuant to this section shall
106 be commenced by filing a complaint and shall be governed by
107 the rules of civil procedure. A declaratory action instituted
108 pursuant to this section is not a claim, as such term is
109 defined in s. 731.201. Nothing in s. 733.702 shall require
110 the filing of a statement of claim in the estate of the
111 decedent as a condition precedent to instituting a
112 declaratory action pursuant to this section. Section 733.710
113 shall not apply to a declaratory action instituted pursuant
114 to this section.

115 (2) The personal representative or curator has no duty
116 to discover whether any property held by the decedent or the
117 decedent's surviving spouse at the time of the decedent's
118 death is property to which ss. 732.216-732.228 apply, or may
119 apply, unless a written demand is made by the surviving spouse
120 or a beneficiary within 6 months after service of a copy of
121 the notice of administration on the surviving spouse or
122 beneficiary, or by a creditor on or before the later of the
123 date that is 3 months after the time of the first publication
124 of the notice to creditors or, as to any creditor required to
125 be served with a copy of the notice to creditors, 30 days
126 after the date of service on the creditor.

127 (3) The declaratory action authorized by this section
128 is extinguished if not commenced prior to expiration of the
129 2-year statute of repose period set forth in subsection (1).

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130 The rights of any person interested as or through a party
 131 that fails to commence a timely declaratory action pursuant
 132 to this section are forfeit, and the decedent's surviving
 133 spouse, personal representative or curator and any other
 134 person or entity that at any time is in possession of any
 135 property to which ss. 732.216-732.228 apply, or may apply,
 136 shall not be subject to liability for any such forfeit rights,
 137 and the decedent's personal representative or curator may
 138 distribute the assets of the decedent's estate without
 139 liability for any such forfeit rights.

140 (4) Nothing in this section shall restrict the
 141 bringing of a quiet title or declaratory action regarding any
 142 right, title or interest in any property held by the decedent
 143 or the decedent's surviving spouse at the time of the
 144 decedent's death as to issues or matters not arising under
 145 ss. 732.216-732.228, wholly or partly.

146 Section 5. Section 732.223, Florida Statutes, is
 147 repealed and replaced with the following:

148 732.223 Protection of payors and other third parties.-

149 (1) Although a property interest is subject to
 150 property rights under ss. 732.216-732.228, a payor or other
 151 third party is not liable for paying, distributing, or
 152 transferring the property to a beneficiary designated in a
 153 governing instrument, or for taking any other action in good
 154 faith reliance on the validity of a governing instrument.

155 (2) As used in this section the term:

156 (a) "Governing instrument" means a deed; will; trust;
 157 insurance or annuity policy; account with payable-on-death
 158 designation; security registered in beneficiary form (TOD);
 159 pension, profit-sharing, retirement, or similar benefit plan;
 160 an instrument creating or exercising a power of appointment

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161 or a power of attorney; or a dispositive, appointive, or
162 nominative instrument of any similar type.

163 (b) "Payor" means the decedent's personal
164 representative, a trustee of a trust created by the decedent,
165 an insurer, business entity, employer, government,
166 governmental agency or subdivision, or any other person
167 authorized or obligated by law or a governing instrument to
168 make payments.

169 (c) "Person" includes an individual, trust, estate,
170 partnership, association, company, or corporation.

171 Section 6. Section 732.225, Florida Statutes, is revised
172 to read:

173 732.225 Acts of married persons.—Sections 732.216-
174 732.228 do not prevent married persons from severing or
175 altering their interests in property to which these sections
176 apply. The reinvestment of any property to which these
177 sections apply in real property located in this state which
178 is or becomes homestead property or real or personal property
179 held as tenants by the entirety creates a conclusive
180 presumption that the spouses have agreed to terminate the
181 community property attribute of the property reinvested.

182 Section 7. Section 732.702 (1), Florida Statutes, is
183 revised to read:

184 732.702 Waiver of spousal rights.—

185 (1) The rights of a surviving spouse to an elective
186 share, intestate share, pretermitted share, homestead, to
187 assert a claim under the Florida Uniform Disposition of
188 Community Property Rights at Death Act (ss. 732.216-732.228),
189 exempt property, family allowance, and preference in
190 appointment as personal representative of an intestate estate
191 or any of those rights, may be waived, wholly or partly, before
192 or after marriage, by a written contract, agreement, or
193 waiver, signed by the waiving party in the presence of two

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194 subscribing witnesses. The requirement of witnesses shall be
195 applicable only to contracts, agreements, or waivers signed
196 by Florida residents after the effective date of this law. Any
197 contract, agreement, or waiver executed by a nonresident of
198 Florida, either before or after this law takes effect, is
199 valid in this state if valid when executed under the laws of
200 the state or country where it was executed, whether or not he
201 or she is a Florida resident at the time of death. Unless the
202 waiver provides to the contrary, a waiver of "all rights," or
203 equivalent language, in the property or estate of a present
204 or prospective spouse, or a complete property settlement
205 entered into after, or in anticipation of, separation,
206 dissolution of marriage, or divorce, is a waiver of all rights
207 to elective share, intestate share, pretermitted share,
208 homestead, to assert a claim under the Florida Uniform
209 Disposition of Community Property Rights at Death Act (ss.
210 732.216-732.228), exempt property, family allowance, and
211 preference in appointment as personal representative of an
212 intestate estate, by the waiving party in the property of the
213 other and a renunciation by the waiving party of all benefits
214 that would otherwise pass to the waiving party from the other
215 by intestate succession or by the provisions of any will
216 executed before the written contract, agreement, or waiver.

217 Section 8. Section 733.212(2), Florida Statutes, is
218 revised to add a new subsection (g):

219 (g) That, the personal representative or curator has
220 no duty to discover whether any property held by the decedent
221 or the decedent's surviving spouse at the time of the
222 decedent's death is property to which the Florida Uniform
223 Disposition of Community Property Rights at Death Act (ss.
224 732.216-732.228) applies, or may apply, unless a written
225 demand is made by the surviving spouse or a beneficiary during
226 the time period set forth in s. 732.221.

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227 Section 9. Section 733.2121(1), Florida Statutes, is
228 revised to read:

229 (1) Unless creditors' claims are otherwise barred by
230 s. 733.710, the personal representative shall promptly
231 publish a notice to creditors. The notice shall contain the
232 name of the decedent, the file number of the estate, the
233 designation and address of the court in which the proceedings
234 are pending, the name and address of the personal
235 representative, the name and address of the personal
236 representative's attorney, and the date of first publication.
237 The notice shall state that creditors must file claims against
238 the estate with the court during the time periods set forth
239 in s. 733.702, or be forever barred. The notice shall state
240 that a personal representative or curator has no duty to
241 discover whether any property held by the decedent or the
242 decedent's surviving spouse at the time of the decedent's
243 death is property to which the Florida Uniform Disposition of
244 Community Property Rights at Death Act (ss. 732.216-732.228)
245 applies, or may apply, unless a written demand is made by a
246 creditor during the time period set forth in s. 732.221.

247 Section 10. Section 733.607(1), Florida Statutes, is
248 revised to read:

249 (1) Except as otherwise provided by a decedent's will,
250 every personal representative has a right to, and shall take
251 possession or control of, the decedent's property, except the
252 protected homestead, but any real property or tangible
253 personal property may be left with, or surrendered to, the
254 person presumptively entitled to it unless possession of the
255 property by the personal representative will be necessary for
256 purposes of administration. The request by a personal
257 representative for delivery of any property possessed by a
258 beneficiary is conclusive evidence that the possession of the
259 property by the personal representative is necessary for the

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260 purposes of administration, in any action against the
261 beneficiary for possession of it. The personal representative
262 shall take all steps reasonably necessary for the management,
263 protection, and preservation of the estate until distribution
264 and may maintain an action to recover possession of property
265 or to determine the title to it. Notwithstanding anything in
266 this section to the contrary, the personal representative has
267 no right to, and shall not knowingly take possession or
268 control of, a surviving spouse's one-half share of property
269 to which the Florida Uniform Disposition of Community
270 Property Rights at Death Act (ss. 732.216-732.228) applies.

271 Section 11. The act shall take effect upon becoming law.

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