

**SUPPLEMENTAL TO EXECUTIVE COUNCIL AGENDA  
THE BREAKERS 2023**

**X. Probate and Trust Law Division Report** — *Jon Scuderi, Division Director*

**Action Item:**

*Substitute motion and legislative package are attached.*

2. **Probate Law and Procedure Committee** – Theodore Kypreos, Chair

The Johnson v. Townsend Fix: Proposed legislation to clarify existing Florida law by statutorily exempting title disputes arising under the Florida Uniform Disposition of Community Property Rights at Death Act (“Act”) from Florida’s probate creditor claims procedure; creating a new dispute resolution mechanism and 2 year statute of repose specifically designed for title disputes arising under the Act, and making narrowly focused modifications to the Act and other related provisions of the Florida Probate Code to reduce the risk of unintended forfeitures of the property rights the Act is intended to preserve.

Motion to:

- (A) clarify existing Florida law by statutorily exempting title disputes arising under the Florida Uniform Disposition of Community Property Rights at Death Act (“Act”) from Florida’s probate creditor claims procedure; creating a new dispute resolution mechanism and 2 year statute of repose specifically designed for title disputes arising under the Act, and making narrowly focused modifications to the Act and other related provisions of the Florida Probate Code to reduce the risk of unintended forfeitures of the property rights the Act is intended to preserve;
- (B) find that the legislative position is within the purview of the RPPTL Section; and
- (C) expend funds in support of the proposed legislative position.

**XI. Real Property Law Division Report** — *Wm. Cary Wright, Division Director*

**Information Item:**

*Additional Information item.*

2. **Real Property Problems Study** – Susan K. Spurgeon, Chair

Presentation of proposed legislation that will abrogate existing common law doctrines to the extent that those doctrines might prevent the creation of easements or other interests in land or declare those interest void at the inception.

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

**To:** Jon Scuderi, Director, Probate & Trust Law Division

**From:** Juan C. Antúnez, Chair, Drafting Subcommittee

**CC:** Christopher W. Smart, Title Insurance & Title Insurance Liaison Committee  
Alan B. Fields, Title Insurance & Title Insurance Liaison Committee  
Anne Q. Pollack, Insurance and Surety Committee  
Susan K. Spurgeon, Real Property Problems Study Committee  
Theodore S. Kypreos, Chair, Probate Law & Procedure Committee  
Drafting Subcommittee Members:

1. Stacey Prince-Troutman
2. Richard Warner
3. Patrick J. Lannon
4. Anthony P. Guettler
5. Edward Downey
6. George L. Metcalfe Jr.

**Subject:** Amended legislative package for Executive Council meeting at the Breakers on July 22, 2023; the *Johnson v. Townsend* fix

**Date:** July 17, 2023

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Dear Jon -

Attached please find our subcommittee's amended legislative package for submission in anticipation of the Executive Council meeting at the Breakers on July 22, 2023.

In anticipation of the Breakers meeting our legislative proposal was also provided for review and comment to (1) Christopher W. Smart, Chair of the Title Insurance & Title Insurance Liaison Committee, (2) Anne Q. Pollack, Vice Chair of the Insurance and Surety Committee, and (3) Susan K. Spurgeon, Chair of the Real Property Problems Study. In terms of changes to the proposed legislation the only proposal came from Alan B. Fields of the Title Insurance & Title Insurance Liaison Committee. Mr. Fields proposed, and we accepted, a narrow, clarifying textual change to subparagraph 4 of section 732.221, which is reflected in the bold, underlined text below:

(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.

This change is included in the attached amended materials. The attached materials also reflect changes made to address comments and suggestions received at the Delray Executive Council meeting. For ease of reference, I have attached a redline version of the Bill showing all changes made after the Delray Executive Council meeting (including the last change proposed by Mr. Fields).

Sincerely,  
Juan

Attachments:

1. White Paper
2. Bill
3. 2023 Legislative Request Form Probate
4. Bill (redline)

## 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.,<sup>1</sup> the largest recipient of domestic state-to-state migration within the U.S.,<sup>2</sup> and the largest recipient of international migration to the U.S.<sup>3</sup> Puerto Rico is the most populous U.S. territory,<sup>4</sup> and Florida is the largest recipient of migrants to the mainland from Puerto Rico.<sup>5</sup>

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.”<sup>6</sup>

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

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<sup>1</sup> 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>.

<sup>2</sup> 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](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>.

<sup>3</sup> 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](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>.

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

<sup>5</sup> 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>.

<sup>6</sup> *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”).<sup>7</sup> 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.<sup>8</sup>

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. In Texas even income derived from separate property belongs to the community, including interest and dividends from separately owned securities. The husband is the manager of the community. But this management is not equivalent to ownership. He acts as a managing agent or trustee or managing partner of a limited partnership.

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<sup>7</sup> 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.

<sup>8</sup> 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).

The husband may sell or donate community property but not in fraud of his wife's rights. The earnings of the husband during marriage are community, and property purchased with such earnings is also community. The wife's rights, aside from managerial control, are the same as the husband's. 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 complete testamentary disposition over her half and may leave it even to her paramour.<sup>9</sup>

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."<sup>10</sup> 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).<sup>11</sup> 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."<sup>12</sup>

Under long-established common law spouses relocating to Florida from a community-property jurisdiction retain their rights in property that was community property prior to their change of domicile (as well as in property substituted therefor).<sup>13</sup> In 1992, Florida's

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

<sup>10</sup> 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](https://www.irs.gov/irm/part25/irm_25-018-001#idm140332604209888).

<sup>11</sup> 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	<b>103,880,066</b>

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

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

<sup>12</sup> 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>.

<sup>13</sup> 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

legislature both simplified and codified this pre-existing common law by adopting the Act. The purpose of the Act is to statutorily preserve “the 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.’”<sup>14</sup>

### **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).

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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.)

<sup>14</sup> *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 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.”) (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 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,<sup>15</sup> 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."<sup>16</sup> Finally, in new subsection (b) below, the legislation preserves the existing protections for personal representatives under the Act.

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<sup>15</sup> 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).

<sup>16</sup> *In re Estate of Gay*, 294 So.2d 668, 670 (Fla. 4th DCA 1974).

**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 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.<sup>17</sup>

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 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.

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<sup>17</sup> 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.”) (Emphasis added.)

## VI. CONSTITUTIONAL ISSUES

The “announced public policy of this state ... requires that estates of decedents be speedily and finally determined.”<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup>

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 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,

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<sup>18</sup> *In re Estate of Gay*, 294 So.2d 668, 670 (Fla. 4th DCA 1974).

<sup>19</sup> 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).

<sup>20</sup> 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.)



[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.<sup>21</sup>

## VII. OTHER INTERESTED PARTIES

None.

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<sup>21</sup> *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 decendent'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:

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

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.



# The Florida Bar

651 East Jefferson Street  
Tallahassee, FL 32399-2300

Joshua E. Doyle  
Executive Director

(850) 561-5600  
www.FLORIDABAR.org

## REAL PROPERTY, PROBATE AND TRUST LAW SECTION LEGISLATIVE OR POLITICAL ACTIVITY REQUEST FORM

- This form is for Section Committees to seek approval for Section legislative or political activities.
- Legislative or political activity is defined in the Standing Board Policies of The Florida Bar (SBP 9.11) as “activity by The Florida Bar or a bar group including, but not limited to, filing a comment in a federal administrative law case, taking a position on an action by an elected or appointed governmental official, appearing before a government entity, submitting comments to a regulatory entity on a regulatory matter, or any type of public commentary on an issue of significant public interest or debate.”
- Requests for legislative and political activity must be made on this form and submitted to the RPPTL Legislation Committee, with your Committee’s white paper.
- Pursuant to SBP 9.50(d), the Section must advise The Florida Bar of proposed legislative or political activity AND circulate the proposal to all Bar divisions, sections and committees that might be interested in the issue.
  - Committees must check with other interested Bar divisions, sections and committees to see if there are comments or issues.
  - If comments have been received from another interested group, the comments must be included.
  - If comments have not yet been received, the proposal may still be submitted to the Legislation Committee, with a list of the interested groups that have been notified and the dates and methods of notification.
  - If a decision needs to be expedited, the proposal must explain the need for an expedited decision and request a specific deadline for a decision by the Bar.
- The Legislation Committee will review the proposal.
  - The proposal will then need to be presented at the Division Round Table.
  - Then, published as an Information Item to the Executive Council.
  - Then, published as an Action Item to the Executive Council.

651 East Jefferson Street • Tallahassee, FL 32399-2300 • FAX: (850) 561-9405

## General Information

**Submitted by:** *(name of Section Committee):*

Probate Law & Procedure Committee of the Real Property Probate and Trust Law  
Section of The Florida Bar.

**Contact:**

*Name of Committee Chair(s), address and phone number:*

Theodore S. Kypreos, Chair, Probate Law & Procedure Committee  
Jones Foster P.A.  
505 South Flagler Drive, Suite 1100  
West Palm Beach, FL 33401  
Tele: (561) 650-0429, Cell: (561) 650-0429  
Email: TKypreos@jonesfoster.com

*Name of Sub-committee Chair, if any, address and phone number, if any:*

Juan C. Antúnez, Sub-committee Chair, Probate Law & Procedure Committee  
Stokes McMillan Antúnez Martínez-Lejarza P.A.  
Two Dattran Center, Suite 1901  
9130 South Dadeland Boulevard  
Miami, Florida 33156  
Tele: (305) 379-4008  
Email: jantunez@smpalaw.com

## Proposed Advocacy

Complete #1 below if the issue is legislative OR #2 if the issue is political; AND #3 must be completed.

### 1. Proposed Wording of Legislative Position for Official Publication

Supports 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.

### 2. Political Proposal

Not applicable.

**3. Reasons For Proposed Advocacy**

a. Per SBP 9.50(a), does the proposal meet all three of the following requirements?  
(select one)       X   Yes            No

- It is within the group’s subject matter jurisdiction as described in the Section’s Bylaws;
- It is ~~beyond the scope of the Section/Bar’s permissible legislative or political activity,~~ **or** within the Section/Bar’s permissible scope of legislative or political activity **and** consistent with an official Section/Bar position on that issue; **and**
- It does not have the potential for deep philosophical or emotional division among a substantial segment of the Bar’s membership.

b. Additional Information: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Referrals to Other Committees, Divisions & Sections/Voluntary Bar Groups**

Pursuant to SBP 9.50(d), the Section must provide copies of its proposed legislative or political actions to all Bar committees, divisions, sections and voluntary bar groups that may be interested in the issue. **List** all Bar committees, divisions, sections and voluntary bar **groups that this proposal has been shared with** pursuant to this requirement, **the date the proposal was shared**, and **provide all comments** received from such groups as part of your submission. The Section may submit its proposal before receiving comments, but only after the proposal has been provided to other bar divisions, sections or committees. A form for sharing proposals is available for this purpose.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Contacts**

**Legislation Committee Appearance** *(list name, address and phone #)*

Sancha K. Brennan, Legislation Committee Co-Chair, 545 Delaney Avenue, Hovey Court, Bldg. 1, Orlando, FL 32801, Telephone: 407-893-7888

\_\_\_\_\_  
\_\_\_\_\_

**Appearances before Legislators** *(list name and phone # of those having direct contact before House/Senate committees)*

\_\_\_\_\_

*c/o Dean, Mead & Dunbar, PA, 215 South Monroe Street, Ste. 815, Tallahassee, FL  
32301, Telephone 850-999-4100*

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**Meetings with Legislators/staff** *(list name and phone # of those having direct contact with legislators)*

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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:

[7367.0000034/4167247/4]

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

36 (1) ~~(1)~~ Personal property, except personal property  
37 held as tenants by the entirety, wherever located, which: (a)  
38 Was acquired as, or became and remained, community property  
39 under the laws of another jurisdiction; (b) Was acquired with  
40 the 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) ~~(2)~~ Real property, except homestead and real  
44 property held as tenants by the entirety, which is located in  
45 this state, and which: (a) Was acquired with the rents,  
46 issues, or income of, the proceeds from, or in exchange for,  
47 property acquired as, or which became and remained, community  
48 property under the laws of another jurisdiction; or (b) Is  
49 traceable to that community property.

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

52 (2) ~~(2)~~ Real property located in this state, ~~other~~  
53 ~~than homestead and real property held as tenants by the~~  
54 ~~entirety,~~ and personal property wherever located acquired by  
55 a married person while domiciled in a jurisdiction under whose  
56 laws property could not then be acquired as community property  
57 and title to which was taken in a form which created rights  
58 of 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) ~~(1)~~ Upon the death of a married person, one-  
64 half of the property to which ss. 732.216-732.228 apply is  
65 the property of the surviving spouse, and is not property of  
66 the decedent's probate estate, and is not subject to

[7367.0000034/4167247/4]



67 testamentary disposition by the decedent or distribution  
 68 under the laws of succession of this state. One-half of that  
 69 property is the property of the decedent's probate estate and  
 70 is subject to testamentary disposition or distribution under  
 71 the laws of succession of this state. The decedent's one-half  
 72 of that property is not in the elective estate. For purposes  
 73 of this 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) ~~(2)~~ —If not previously waived pursuant to s.  
 77 732.702, subsequent to the ~~filing of a petition for~~  
 78 ~~administration, decedent's death~~ a surviving spouse or any  
 79 person acting on behalf of a surviving spouse, including, but  
 80 not limited to, an attorney in fact, agent, guardian of the  
 81 property, or personal representative of the surviving spouse,  
 82 may at any time waive the surviving spouse's rights to assert  
 83 a claim to any right, title or interest in any property ~~to~~  
 84 ~~which~~ held by the decedent at the time of the decedent's death  
 85 arising under ss. 732.216-732.228 ~~apply~~, wholly or partly, by  
 86 a written contract, agreement, or waiver, signed by the  
 87 waiving party, if the following or substantially similar  
 88 language is included in the contract, agreement, or waiver:

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

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

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

100 Demands or disputes regarding any right, title, ~~2-year~~  
 101 ~~statute of repose.—~~

103 (1) ~~Demands or disputes regarding title to or interest~~  
 104 in any property held by the decedent or the decedent's  
 105 surviving spouse at the time of the decedent's death ~~to~~  
 106 ~~which arising under ss. 732.216-732.228 apply, wholly or may~~  
 107 ~~apply partly, shall be determined in a declaratory judgment~~  
 108 ~~action governed by ch. 86. action commenced within 2 years~~  
 109 ~~after the decedent's death, or be forever barred. A~~  
 110 ~~declaratory judgment action instituted pursuant to this~~  
 111 ~~section shall be commenced within 2 years after the decedent's~~  
 112 ~~death, or be forever barred. by filing a complaint and shall~~  
 113 ~~be governed by the rules of civil procedure. A declaratory~~  
 114 ~~judgment~~ action instituted pursuant to this section is not a  
 115 claim, as such term is defined in s. 731.201. Nothing in s.  
 116 733.702 shall require the filing of a statement of claim in  
 117 the estate of the decedent as a condition precedent to  
 118 instituting a declaratory ~~judgment~~ action pursuant to this  
 119 section. Section 733.710 shall not apply to a declaratory  
 120 ~~judgment~~ action instituted pursuant to this section.

122 (2) ~~(b)~~ The personal representative or curator has no  
 123 duty to discover whether any property held by the decedent or  
 124 the decedent's surviving spouse at the time of the decedent's  
 125 death is property to which ss. 732.216-732.228 apply, or may  
 126 apply, unless a written demand is made by the surviving spouse  
 127 or a beneficiary within 6 months after service of a copy of  
 128 the notice of administration on the surviving spouse or  
 129 beneficiary, or by a creditor on or before the later of the  
 130 date that is 3 months after the time of the first publication

[7367.0000034/4167247/4]

131 of the notice to creditors or, as to any creditor required to  
132 be served with a copy of the notice to creditors, 30 days  
133 after the date of service on the creditor.

134  
135 (3) ~~(e)~~The declaratory ~~judgment cause of~~ action  
136 authorized by this section is extinguished if not commenced  
137 prior to expiration of the 2-year statute of repose period  
138 set forth in subsection ~~(a)~~. The rights of any person  
139 interested as or through a party that fails to commence a  
140 timely declaratory ~~judgment~~ action pursuant to this section  
141 are forfeit, and the decedent's surviving spouse, personal  
142 representative or curator and any other person or entity that  
143 at any time is in possession of any property to which ss.  
144 732.216-732.228 apply, or may apply, shall not be subject to  
145 liability for any such forfeit rights, and the decedent's  
146 personal representative or curator may distribute the assets  
147 of the decedent's estate without liability for any such  
148 forfeit rights.

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

155 Section 5. Section 732.223, Florida Statutes, is  
156 repealed and replaced with the following:

157 732.223 Protection of payors and other third parties.—

158 (1) Although a property interest is subject to  
159 property rights under ss. 732.216-732.228, a payor or other  
160 third party is not liable for paying, distributing, or  
161 transferring the property to a beneficiary designated in a  
162 governing instrument, or for taking any other action in good  
163 faith reliance on the validity of a governing instrument.

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

165           (a) ~~(a)~~ "Governing instrument" means a deed; will;  
 166 trust; insurance or annuity policy; account with payable-on-  
 167 death designation; security registered in beneficiary form  
 168 (TOD); pension, profit-sharing, retirement, or similar  
 169 benefit plan; an instrument creating or exercising a power of  
 170 appointment or a power of attorney; or a dispositive,  
 171 appointive, or nominative instrument of any similar type.

172           (b) ~~(b)~~ "Payor" means "Payor" means the decedent's  
 173 personal representative, a trustee of a trust created by the  
 174 decedent, an insurer, business entity, employer, government,  
 175 governmental agency or subdivision, or any other person,  
 176 other than the decedent's personal representative or a  
 177 trustee of a trust created by the decedent, authorized or  
 178 obligated by law or a governing instrument to make payments.

179           (c) ~~(e)~~ "Person" includes an individual, trust,  
 180 estate, partnership, association, company, or corporation.

181           Section 6. Section 732.225, Florida Statutes, is revised  
 182 to read:

183           732.225 Acts of married persons.—Sections 732.216-  
 184 732.228 do not prevent married persons from severing or  
 185 altering their interests in property to which these sections  
 186 apply. The reinvestment of any property to which these  
 187 sections apply in real property located in this state which  
 188 is or becomes homestead property or real or personal property  
 189 held as tenants by the entirety creates a conclusive  
 190 presumption that the spouses have agreed to terminate the  
 191 community property attribute of the property reinvested.

192           Section 7. Section 732.702 (1), Florida Statutes, is  
 193 revised to read:

194           732.702 ~~—~~Waiver of spousal rights.—

195           (1) ~~(1)~~ The rights of a surviving spouse to an  
 196 elective share, intestate share, pretermitted share,

[7367.0000034/4167247/4]

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

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

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230           (g) That, the personal representative or curator has  
231 no duty to discover whether any property held by the decedent  
232 or the decedent's surviving spouse at the time of the  
233 decedent's death is property to which the Florida Uniform  
234 Disposition of Community Property Rights at Death Act (ss.  
235 732.216-732.228) applies, or may apply, unless a written  
236 demand is made by the surviving spouse or a beneficiary during  
237 the time period set forth in s. 732.221.

238           Section 9. Section 733.2121(1), Florida Statutes, is  
239 revised to read:

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

258           Section 10. Section 733.607(1), Florida Statutes, is  
259 revised to read:

260           (1) ~~(1)~~ Except as otherwise provided by a decedent's  
261 will, every personal representative has a right to, and shall  
262 take possession or control of, the decedent's property,

[7367.0000034/4167247/4]

263 except the protected homestead, but any real property or  
264 tangible personal property may be left with, or surrendered  
265 to, the person presumptively entitled to it unless possession  
266 of the property by the personal representative will be  
267 necessary for purposes of administration. The request by a  
268 personal representative for delivery of any property  
269 possessed by a beneficiary is conclusive evidence that the  
270 possession of the property by the personal representative is  
271 necessary for the purposes of administration, in any action  
272 against the beneficiary for possession of it. The personal  
273 representative shall take all steps reasonably necessary for  
274 the management, protection, and preservation of the estate  
275 until distribution and may maintain an action to recover  
276 possession of property or to determine the title to it.  
277 Notwithstanding anything in this section to the contrary, the  
278 personal representative has no right to, and shall not  
279 knowingly take possession or control of, a surviving spouse's  
280 one-half share of property to which the Florida Uniform  
281 Disposition of Community Property Rights at Death Act (ss.  
282 732.216-732.228) applies.

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



# The Florida Bar

651 East Jefferson Street  
Tallahassee, FL 32399-2300

Joshua E. Doyle  
Executive Director

(850) 561-5600  
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## REAL PROPERTY, PROBATE AND TRUST LAW SECTION LEGISLATIVE OR POLITICAL ACTIVITY REQUEST FORM

- This form is for Section Committees to seek approval for Section legislative or political activities.
- Legislative or political activity is defined in the Standing Board Policies of The Florida Bar (SBP 9.11) as “activity by The Florida Bar or a bar group including, but not limited to, filing a comment in a federal administrative law case, taking a position on an action by an elected or appointed governmental official, appearing before a government entity, submitting comments to a regulatory entity on a regulatory matter, or any type of public commentary on an issue of significant public interest or debate.”
- Requests for legislative and political activity must be made on this form and submitted to the RPPTL Legislation Committee, with your Committee’s white paper.
- Pursuant to SBP 9.50(d), the Section must advise The Florida Bar of proposed legislative or political activity AND circulate the proposal to all Bar divisions, sections and committees that might be interested in the issue.
  - Committees must check with other interested Bar divisions, sections and committees to see if there are comments or issues.
  - If comments have been received from another interested group, the comments must be included.
  - If comments have not yet been received, the proposal may still be submitted to the Legislation Committee, with a list of the interested groups that have been notified and the dates and methods of notification.
  - If a decision needs to be expedited, the proposal must explain the need for an expedited decision and request a specific deadline for a decision by the Bar.
- The Legislation Committee will review the proposal.
  - The proposal will then need to be presented at the Division Round Table.
  - Then, published as an Information Item to the Executive Council.
  - Then, published as an Action Item to the Executive Council.

651 East Jefferson Street • Tallahassee, FL 32399-2300 • FAX: (850) 561-9405



## General Information

Submitted by: (name of Section Committee) Real Property Problems Study

Contact: (Name of Committee Chair(s), address and phone number) Susan Spurgeon  
[sspurgeon@shutts.com](mailto:sspurgeon@shutts.com), 813-227-8164

(Name of Sub-committee Chair, if any, address and phone number, if any) \_\_\_\_\_

Colleen Sachs, 800-432-9594 [EXT. 7711], [csachs@thefund.com](mailto:csachs@thefund.com)

## Proposed Advocacy

Complete #1 below if the issue is legislative OR #2 if the issue is political; AND #3 must be completed.

### 1. Proposed Wording of Legislative Position for Official Publication

Abolishing common law doctrines that have been argued to prevent easements, covenants, servitudes, restrictions and similar land planning and development tools from coming into existence when all of the benefitted, burdened and affected lands are in common ownership.

### 2. Political Proposal

Preserving easements, use rights, and deed and community restrictions created for condominiums, homeowners associations, deed restricted communities, and adjacent properties.

### 3. Reasons For Proposed Advocacy

- a. Per SBP 9.50(a), does the proposal meet all three of the following requirements? (select one)     Yes     No
- It is within the group's subject matter jurisdiction as described in the Section's Bylaws;
  - It is beyond the scope of the Section/Bar's permissible legislative or political activity, **or** within the Section/Bar's permissible scope of legislative or political activity **and** consistent with an official Section/Bar position on that issue; **and**
  - It does not have the potential for deep philosophical or emotional division among a substantial segment of the Bar's membership.
- b. Additional Information: \_\_\_\_\_

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### Referrals to Other Committees, Divisions & Sections/Voluntary Bar Groups

Pursuant to SBP 9.50(d), the Section must provide copies of its proposed legislative or political actions to all Bar committees, divisions, sections and voluntary bar groups that may be interested in the issue. **List** all Bar committees, divisions, sections and voluntary bar **groups that this proposal has been shared with** pursuant to this requirement, **the date the proposal was shared**, and **provide all comments** received from such groups as part of your submission. The Section may submit its proposal before receiving comments, but only after the proposal has been provided to other bar divisions, sections or committees. A form for sharing proposals is available for this purpose.

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Florida Home Builders

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Florida Land Title Association

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City, County & Local Government Law Section

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Environmental & Land Use Law Section

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### Contacts

#### Legislation Committee Appearance *(list name, address and phone #)*

Colleen Sachs, Attorneys' Title Fund Services, LLC, 6545 Corporate Centre Boulevard, Orlando, Florida 32822, 800-432-9594 [EXT. 7711],

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Sancha K. Brennan, Legislation Committee Co-Chair, 545 Delaney Avenue, Hovey Court, Bldg. 1, Orlando, FL 32801, Telephone: 407-893-7888

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Steven H. Mezer, Legislation Committee Co-Chair, 1511 Westshore Boulevard, Suite 1000, Tampa, FL 33607, Telephone 813-527-3900

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#### Appearances before Legislators *(list name and phone # of those having direct contact before House/Senate committees)*

Pete Dunbar, French Brown, and Martha Edenfield

c/o Dean, Mead & Dunbar, PA, 215 South Monroe Street, Ste. 815, Tallahassee, FL 32301, Telephone 850-999-4100

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#### Meetings with Legislators/staff *(list name and phone # of those having direct contact with legislators)*

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1 An act relating to real property, clarifying common law  
2 doctrines regarding creation of easements, servitudes and other  
3 matters affecting land.

4 WHEREAS, Florida has been one of the fastest-growing states  
5 in the nation for decades, and has led other states in planning  
6 for the challenges presented in ways that both support and  
7 encourage economic growth while preserving the things that make  
8 Florida a desirable state in which to live, including  
9 preservation of its natural beauty; and

10 WHEREAS, Laws to facilitate proper planning have long been  
11 implemented at all levels of Florida government, resulting in  
12 statewide, regional, county and local comprehensive plans,  
13 enforced through zoning, land use restrictions, and development  
14 orders; and

15 WHEREAS, These laws and the property owner's plans for  
16 development its property, are often implemented in the form of  
17 various instruments which are imposed and recorded while the  
18 property owner owns all of the affected land.

19 WHEREAS, the recent decision of the Second District Court  
20 of Appeal, rendered in February 2023, in *King v. Roorda*, 335 So.  
21 3d 1001 (Fla. 2d DCA 2023) holds, based on the holding of the  
22 Fifth District Court of Appeal, rendered in 2004, in *One Harbor*  
23 *Fin. Ltd. v. Hynes Props., LLC*, 884 So. 2d 1039 (Fla. 5th DCA  
24 2004) that an attempt by the fee simple owner of two or more  
25 parcels of real property to create an easement(s) which burdens  
26 one of its parcels and benefits the other was void *ab initio*;

27 WHEREAS, the decisions above may bring into question the  
28 viability of such instruments.

29

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

RM:6724080:1

31 Section 1. Section 704.09 Florida Statutes is created  
32 to read as follows:

33 704.09. Clarification of common law doctrines regarding  
34 creation of easements, servitudes and other matters affecting  
35 land.-

36 (1) To the extent there may be a rule at common law that,  
37 at the time of creation, an interest granted in one's own land  
38 is void ab initio, or subject to the doctrine of merger, or  
39 otherwise invalid immediately by virtue of the common ownership  
40 of the land, it is hereby abolished.

41 (2) Subsection (1) clarifies existing law, and applies to,  
42 without limitation, any easement, servitude, right in the nature  
43 of an easement, negative easement, environmental easement, solar  
44 easement, license, profit, use right, restriction, condition,  
45 reservation, or other covenant, contained in an instrument  
46 recorded in the official records, whether denominated as an  
47 easement, deed, plat, declaration of condominium, homeowners'  
48 association covenant, condition, restriction, servitude, or  
49 otherwise.

50 Section 2. This act shall take effect upon becoming law.

(Draft as of 07/14/2023)

## **WHITE PAPER**

### **CLARIFYING THE LAW OF COMMON OWNERSHIP AND THE CREATION OF EASEMENTS**

#### **I. SUMMARY**

This Bill clarifies that to the extent there is a rule at common law that would void, invalidate prohibit or subject a newly created interest in land to the doctrine of merger, it is abolished.

Florida has been one of the fastest-growing states in the nation for decades, and has led other states in passing laws requiring proper planning at all levels of Florida government.<sup>1</sup> These include requirements for statewide, regional, county and local planning and comprehensive plans, which are then implemented through zoning ordinances, land use restrictions, and development orders as well as easements, covenants, restrictions, declarations and other instruments establishing servitudes upon the land, which are often imposed and recorded while the property owner owns all of the affected and benefitted land.

Some recent judicial interpretations, discussed below, have called into question the validity of easements, and by extension any easement, servitude, right in the nature of an easement, negative easement, environmental easement, solar easement, license, profit, use right, restriction, condition, reservation, or other covenant if such are created at a time when all of the land benefitted and burdened thereby are in common ownership.

This purported application of comparatively ancient common law doctrines is contrary to the long established land planning regime implemented in Florida and would deprive land planners, governments and property owners of an important tool long used in implementing planning and development decisions and negate the justifiable expectations of property owners as to their rights and protections when buying in a condominium, planned development or community association.

#### **II. CURRENT SITUATION**

The practice in Florida has long been for the developer of a property planned for sale to record plats, easements, restrictive covenants, homeowner's association documents, condominium declarations before the first parcel is sold.

A number of relatively recent appellate level cases have held that an easement is void if the dominant and servient estates are owned by the same party at the time the easement is created. These cases include:

---

<sup>1</sup> See e.g. Chapter 380, Florida Statutes (creating the state land planning agency, setting standards for developments of regional impact, and coastal planning); Chapter 163, Part II, Florida Statutes (mandating county and municipal comprehensive plans)

- *King v. Roorda*, 335 So. 3d 1001 (Fla. 2nd DCA 2023)
- *One Harbor Fin. Ltd. Co. v. Hynes Properties, LLC*, 884 So. 2d 1039 (Fla. 5th DCA 2004)
- *Hensel v. Aurilio*, 417 So. 2d 1035, 1038 (Fla. 4th DCA 1982)
- *Morris v. Garcia*, 224 So. 3d 268 n. 1 (Fla. 3rd DCA 2017)
- *AFP 103 Corp. v. Common Wealth Trust Services, LLC*, 2023 WL 2146247, (Fla. 3rd DCA 2023)

By implication, the logic of these cases call into question not only express stand-alone easements granted prior to, but in contemplation of a sale of a portion of the property, but many easements, servitudes, use rights, restrictions, or other covenants such as those routinely contained in recorded plats, declarations of condominium, homeowners’ association documents.

Such rulings frustrate the parties who clearly intended to create an easement or other interest by recording the instruments in question. A broad application of these rulings has the potential to adversely and unexpectedly impact the owners of properties in any number of subdivisions, homeowners’ associations, and condominiums across the state, who bought rightly expecting to have the access, use of parks and common areas and be subject to the community standards spelled out in the recorded instruments governing their communities.

The broad application also has to potential to upend decades of land planning under Chapters 380, Florida Statutes (creating the state land planning agency, setting standards for developments of regional impact, and coastal planning) and Chapter 163, Part II, Florida Statutes (mandating county and municipal comprehensive plans) to the extent those were implemented through recorded easements, declarations, covenants and restrictions at a time when the affected land was under common ownership.

### **III. EFFECT OF PROPOSED CHANGES**

New section 704.09(1) will abrogate existing common law doctrines to the extent that those doctrines might prevent the creation of easements or other interests in land or declare those interest void at the inception.

New section 704.09(2) makes clear that this applies to a broad group of rights and interests in land – specifically listing “any easement, servitude, right in the nature of an easement, negative easement, environmental easement, solar easement, license, profit, use right, restriction, condition, reservation, or other covenant, contained in an instrument recorded in the official records” – without regard to the nature of the instrument by which it is created – listing “an easement, deed, plat, declaration of condominium, homeowners’ association covenant, condition, restriction, servitude, or otherwise.”

The bill limits the application of the common law doctrines only as of the time of creation of an easement or other interest. It does not alter the application of the Doctrine of Merger after properties have been reacquired into common ownership, or the ability of the holders of all

properties burdened, benefitted or affected to terminate or modify easements, covenants and reservations in accord with existing law. Nor does it affect the application of the Marketable Record Title Act or other statutes of limitation or repose or other legal doctrines which may have the effect of terminating or limiting interests in land after their initial creation.

The bill is expressly a clarification of existing law, so should be interpreted to preserve previously granted easements, restrictions and other covenants of record and to apply prospectively to such interests created after the effective date.

#### **IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

There is no direct fiscal impact on state or local governments.

The bill may have an indirect operational benefit by preserving easements, covenants, restrictions and the like which were imposed as part of land planning, comprehensive plans or development orders.

#### **V. DIRECT IMPACT ON PRIVATE SECTOR**

Private sector landowners are, for the most part, impacted positively by this legislation positively through having their reasonable expectations met as far as receiving the benefit of recorded easements, plats, condominium declarations, homeowners' association documents and community covenants, restrictions and reservations.

#### **VI. CONSTITUTIONAL ISSUES**

There are no constitutional issues in the clarification of this law.

#### **VII. OTHER INTERESTED PARTIES**

None contacted yet