

WHITE PAPER

Proposed amendment of §§733.607, 733.702, 733.705, and 733.707, Florida Statutes, and enactment of §733.6075, Florida Statutes, to create an orderly process for the payment of enforceable claims of creditors from a decedent's interest in non-exempt, non-probate assets when the probate estate and any revocable trust are insufficient to pay all enforceable claims.

I. SUMMARY

Currently, there is confusion as to whether a decedent's non-exempt, non-probate assets (other than those held in the decedent's revocable trust) are reachable by the decedent's creditors. This proposed legislation creates an orderly process for the payment of enforceable claims of creditors from a decedent's interest in non-exempt, non-probate assets when a decedent's probate estate and any revocable trust are insufficient to pay all enforceable claims.

II. CURRENT SITUATION

Florida's Probate Code, Chapters 731-735, Florida Statutes, and Florida's Trust Code, Chapter 736, Florida Statutes, provide the framework for the orderly administration of decedents' probate and trust assets, including the identification, verification, and payment of creditors' claims. See Chapter 733, Part VII, Florida Statutes. This framework reflects the policy which is firmly rooted in English history that the laws of succession and inheritance should protect the rights of a decedent's creditors. Under Florida's long-established probate system and public policy, distribution is made to a decedent's beneficiaries or heirs only after all expenses of administration, taxes, and the decedent's debts are paid. See §733.608, Florida Statutes, (directing that all assets in the hands of the personal representative are applied to payment of devises, family allowance, elective share, estate and inheritance taxes, claims, charges, expenses of administration, and *obligations of decedent's estate*.) and §733.707 (dictating the order of payment of estate obligations, expenses, taxes, and creditors' claims, all of which have priority over payment of devises and distributions to beneficiaries.) In other words, a decedent's beneficiaries only inherit those probate and revocable trust assets, if any, which are left after all expenses, taxes, and debts are paid.

The right of a decedent's legitimate creditors to be paid is evident in Florida law. Personal representatives are fiduciaries who must use their authority to benefit, not only the heirs and devisees of the decedent, but also the creditors of the decedent. See §733.602(1), Florida Statutes; *Campbell v. Owen*, 132 So.2d 212 (Fla. 2d DCA 1961); and *Fla. Jur. 2d, Decedent's Property* §625. Florida's Probate Code requires that, in addition to publishing notice to creditors for two consecutive weeks, the personal representative must make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable, even if the claims are unmatured, contingent, or unliquidated. See §733.2121(1), Florida Statutes. A

decedent's creditors are entitled to notice even if they know that the estate is being probated. *Foster v. Cianci*, 773 So.2d 1181 (Fla. 2d DCA 2000).

Following the explosion in popularity of revocable trusts in the 1980's, Florida amended §§733.607 and 733.707, Florida Statutes, to provide that the assets of a decedent's revocable trust are subject to the expenses of estate administration and the obligations of the decedent's estate to the extent that the decedent's estate is insufficient to pay them. §§733.607(2) and 733.707(3), Florida Statutes. These amendments, together with their counterpart in the Florida Trust Code, §736.05053(1), Florida Statutes, created a procedure for the orderly payment of a decedent's enforceable creditors' claims from the decedent's revocable trust when the decedent's probate estate is insufficient to pay those claims.

In situations where a probate estate is not opened and the decedent had a revocable trust, the trustee of the decedent's trust is required to file a notice of trust with the court of the county of the settlor's domicile alerting creditors of the existence of the trust. See §736.05055, Florida Statutes. A creditor of the decedent then has the option of opening a probate proceeding and seeking payment from the decedent's revocable trust pursuant to the statutes described in the preceding paragraph.

The foregoing clearly demonstrates Florida's public policy that a decedent's legitimate creditors with enforceable claims are to be paid prior to beneficiaries or heirs inheriting the decedent's non-exempt assets. However, this public policy is being thwarted in certain cases because, in addition to the popularity of revocable trusts, will substitutes have grown in popularity, presumably to avoid expensive estate planning, the time and expense of probate, and perhaps the payment of debts. Increasingly, it appears that will substitutes are being used to transfer decedents' assets by operation of law, and the value of these non-probate transfers can be very significant while the probate estate is very modest.

The Uniform Nonprobate Transfers on Death Act is codified in Article VI of the Uniform Probate Code. Section 6-102 of the UPC "clarifies that the recipients of nonprobate transfers [excluding transferees of a survivorship interest in a joint tenancy of real property and assets exempt from creditors] can be required to contribute to pay allowed claims and statutory allowances to the extent the probate estate is inadequate." (UPC §6-102, Comment 1)

In June 2010, the California Law Revision Commission published a lengthy background study on the Liability of Nonprobate Transfer for Creditor Claims and Family Protections.¹ That study's observations and conclusions include:

- the puzzling phenomenon that creditors have allowed the protections of the probate system to slip away from them (p. 10);

¹ California is significantly behind Florida on this issue in that California does not yet have a procedure for the payment of creditors' claims from decedents' revocable trusts.

- that “the policy, if any, that supports immunization of nonprobate property from a decedent’s creditors and dependents is not obvious” (p. 10); and
- that “all nonprobate transfers, including the decedent’s interest in joint tenancy property, should be liable for a debt of the decedent” (p. 154).

The following are examples of assets that pass outside of probate by operation of law or will substitutes which are not exempt from creditors during a person’s life:

1. Property registered in “beneficiary form” pursuant to Florida’s Transfer-on-Death Statute, Chapter 711 (i.e., where the words “transfer on death,” “TOD,” “pay on death,” or “POD” appear after the name of the owner and before the name of the beneficiary).
2. Accounts established under Florida’s Pay-on-Death Statute, §655.82, Florida Statutes:
 - a. Where there is a “pay-on-death” designation in favor of one or more beneficiaries (i.e., the beneficiary has no rights in the account during the owner’s life, but acquires the account balance at the owner’s death).
 - b. Where there is a “survivorship” designation (i.e., both parties share ownership during their lives, but the survivor becomes the sole owner).
3. Survivorship accounts established under the multiple party account statute, §655.79, Florida Statutes.
4. Totten or Tentative Trust accounts established under former F. S. §655.81, which was repealed in 2001. When §655.81 was repealed, §655.825(1) was enacted so that any Totten Trust accounts would be treated as pay-on-death accounts under §655.82.²
5. Tangible personal property held as joint tenants with right of survivorship (e.g., antiques, collections, art, vehicles, etc.).

² Section 655.825(1), Florida Statutes, enacted in 2001, provides that:

Because deposits in trust are also accounts with a pay-on-death designation as described in s. 655.82, it is the intent of the Legislature that the provisions of s. 655.82 shall apply to and govern deposits in trust. References to s. 655.81 in any depository agreement shall be interpreted after the effective date of this act as references to s. 655.82.

6. Real property held as joint tenants with right of survivorship (but not entireties or homestead property which is exempt from creditors).

There is no doubt that during a person's life, his or her creditors can reach that person's interest in the above-described non-exempt, non-probate assets. However, there is confusion among practitioners and the public as to whether, after a debtor's death, the creditors of the now-deceased debtor (the decedent) can reach the decedent's interest³ in such non-exempt, non-probate assets passing by operation of law.

With respect to property registered as transfer-on-death (hereinafter "TOD property"), pay-on-death accounts (hereinafter "POD accounts"), and Totten Trust accounts, the following authorities suggest that a decedent's interest in these non-probate assets can be reached by a creditor of the decedent:

1. The Florida Transfer-on-Death statute expressly provides that it does not limit the rights of creditors of owners against beneficiaries and other transferees under other laws of this state. §711.509(2), Florida Statutes.
2. RESTATEMENT (THIRD) OF TRUSTS §26 Comments d (ALI 2001), states, "The creditors of a person who establishes a tentative trust can reach the funds on deposit, as may the personal representative of a deceased depositor if assets otherwise available in the estate administration are insufficient to pay debts and funeral, last-illness, and administration expenses." This is consistent with the RESTATEMENT (SECOND) OF TRUSTS §58 Comments d (ALI 1959), which stated that "[C]reditors of a person who makes a savings deposit upon a tentative [or Totten] trust can reach his interest since he has such extensive powers over the deposit as to justify treating him as in substance the unrestricted owner of the deposit. So also, on the death of the depositor if the deposit is needed for the payment of his debts, his creditors can reach it."
3. Bogart, *The Law of Trusts and Trustees*, §233, states that: "[B]ecause of the complete control reserved by the depositor establishing a Totten or savings account trust, funds in such an account at death are usually held subject to the claims of creditors and the surviving spouse of the depositor."
4. *Kearney v. Unibay Co.*, 466 So.2d 271 (Fla. 4th DCA 1985), cites the following statement from *Scott on Trusts* §330.12, with approval: "Since the depositor has complete control over the deposit during his lifetime, . . .

³ In each of these cases (i.e., TOD property, POD accounts, joint accounts, Totten Trust accounts, JTWRROS tangible property, and JTWRROS real property), the specific property interest being considered is only that interest which was solely owned and controlled by the decedent at the time of his or her death and which passed outside of probate by reason of his or her death.

he is treated as the owner insofar as his creditors are concerned. His creditors can reach the deposit while he is living, and can reach it as part of his estate on death.”

5. *Serpa v. North Ridge Bank*, 547 So.2d 199 (Fla. 4th DCA 1991), cites the following statement from *In re Estate of Schuck*, 419 Pa. 466, 214 A.2d 629, 631 (1965), with approval: "A tentative [Totten] trust may be revoked, among other means, . . . by facts and circumstances resulting in inadequacy of the estate assets to satisfy the testamentary gifts, funeral and administration expenses, taxes and other charges."
6. *Rice v. Schember*, 15 FLW C17 (Fla. 6th Jur. Cir. Pinellas Co. 1990), held that a "Totten trust is revoked, as a matter of law, if the estate assets are insufficient to pay administrative, funeral, and medical expenses." *But see Nahar v. Nahar*, 576 So.2d 862 (Fla. 3d DCA 1991) and *In re Barret's Estate*, 137 So.2d 587 (Fla. 1st DCA 1962) which hold that costs of administration may not be paid out of Totten Trust assets which the probate court has not yet determined are subject to probate.

However, the answer is less clear with respect to assets titled as "joint tenants with right of survivorship" (hereinafter "JTWROS"), such as financial accounts, tangible property, and real property titled with the decedent and one or more others, as JTWROS. Although creditors can reach a joint tenant's interest in joint tenancy property during the tenant's life, some authorities appear to suggest that the interest of a joint tenant cannot be reached by his/her creditors after his/her death. *C.J.S., Joint Tenancy, §37, citing Hurlbert v. Shackleton*, 560 So.2d 1276 (Fla. 1st DCA 1990) (A fraudulent transfer case stating in dicta that a judgment creditor's lien on joint tenant's interest in stocks and bonds held as JTWROS was no longer viable after joint tenant's death.) and *Perrott v. Frankie*, 605 So.2d 118 (Fla. 2d DCA 1992) (The attempted fraudulent transfer by one joint tenant of his interest to other joint tenant was void, and property reverted to previous joint tenancy. Since the creditor's lien was not perfected prior to the debtor's death, the property passed to the surviving joint tenant free of the creditor's lien.). See also, *D.A.D., Inc. v. Moring*, 218 So.2d 451 (Fla. 4th DCA 1969) (A valid mortgage given by a joint tenant to encumber her interest in real property created a lien on her interest in the property, but that lien terminated upon her death and was not, thereafter, enforceable against the surviving joint tenant who had not signed the mortgage, and owned the entire property upon the death of the debtor joint tenant.).

Currently, practitioners are divided on the issue of whether or not the *Hurlbert* and *Perrott* cases are legal authority for the proposition that, upon the death of a joint tenant, a creditor cannot reach the deceased joint tenant's interest in an asset which was titled in the names of the decedent and another as JTWROS. If, in fact, a creditor cannot reach the deceased joint tenant's interest in an asset which was titled in the names of the decedent and another as JTWROS upon the death of a joint tenant, then these would be the only type of assets which are available to creditors during life but exempt from creditors solely by reason of death.

To the extent that a decedent's interest in non-exempt, non-probate assets can be reached by creditors, it is unlikely that a creditor can reach these assets through the probate proceeding because, by definition, they are not assets of the decedent's probate estate and are beyond the in rem jurisdiction of the probate court. (The possible exception to this is Totten Trust or POD accounts under a revocation theory, which would appear to make the decedent's interest in the account an asset of the decedent subject to administration.) Also, the trust claims statute is applicable only to revocable trusts and does not encompass these other non-exempt, non-probate assets. See §§733.607, 733.707, and 736.05053, Florida Statutes. By definition, "trusts created by the form of the account or by the deposit agreement at a financial institution" are excluded from the term "trust" in the Florida Trust Code. §731.201(34), Florida Statutes.

Under the current Florida law, the existing problems include:

1. Transferees of a decedent's non-exempt, non-probate assets inherit while creditors with enforceable claims are not paid if probate and revocable trust assets are insufficient.
2. The 3-month (§733.702) and 2-year (§733.710) non-claim statutes do not bar claims against the transferee of a decedent's interest in non-probate assets because the applicability of those statutes is expressly limited to claims against "the decedent's estate, the personal representative, and the beneficiaries." Accordingly, creditors may pursue the transferees of the decedent's interest in TOD property, POD accounts, and Totten Trust accounts, and possibly JTWR0S assets, outside of probate and these time bars.
3. Given that a personal representative owes duties to all interested persons, including unpaid creditors, does a personal representative of an insolvent estate who knows that the decedent had an interest in non-exempt, non-probate assets owe unpaid creditors a duty to collect these assets for the benefit of unpaid creditors? Does a personal representative who fails to advise unpaid creditors of such assets incur any liability?
4. Creditors that should be in the same class are not treated equally. For example, (1) a judgment creditor(s) may recover from non-exempt, non-probate assets, while other judgment creditors go unpaid, and (2) as between creditors, each is on its own to discover and pursue a decedent's interest in non-exempt, non-probate assets, creating a race among creditors to discover and recover from non-probate assets.
5. There may be multiple judicial proceedings, e.g., multiple creditors against a single transferee, or one or more creditors against multiple transferees.
6. Non-probate transferees will probably be treated unfairly as between each other. For example, one non-probate transferee may be pursued by a

creditor and have to pay the decedent's debt while other non-probate transferees retain their benefits without any obligation of contribution.

7. Transferees of a decedent's non-exempt, non-probate assets are unaware of their potential liability to decedent's creditors.

III. EFFECT OF PROPOSED CHANGES

A. Generally

The effect of the proposed legislation is to establish an orderly process for the payment of legitimate, enforceable creditors' claims from a decedent's interest in non-exempt, non-probate assets when the decedent's probate estate and any revocable trusts are insufficient to pay all creditors. The proposed procedure is similar to the existing procedure where a decedent's revocable trust must pay creditors when the probate estate is insufficient. See §§733.607, 733.707 and 736.05053, Florida Statutes. However, unlike the revocable trust's liability for expenses of administration and statutory allowances, the transferee of a decedent's interest in non-exempt, non-probate assets would only be liable for the payment of legitimate debts of the decedent (and any costs and fees incurred in recovering the non-exempt, non-probate assets).

With respect to TOD property, POD accounts, and Totten Trust accounts, the proposed legislation will not change creditors' current rights to recover the value of a decedent's interest in non-exempt, non-probate assets nor will it change transferees' existing liability. However, it will create an orderly, more fair procedure for the payment of enforceable claims of creditors from a decedent's interest in non-exempt, non-probate assets when the probate estate and any revocable trust are insufficient to pay all enforceable claims.

With respect to assets held as JTWR0S, it is unclear whether the proposed legislation will change existing law. However, if the decedent's interest in JTWR0S assets was reachable by the decedent's creditors at the instant before death, there is no reason that the interest should not be reachable by decedent's creditors after his or her death. The decedent's creditors should not be prejudiced or deprived of rights merely by reason of the decedent's death. Strong policy considerations would seem to support this conclusion. It would seem that, regardless of whether a decedent uses a will or a will substitute to transfer his property at death, his or her interest in any property should be subject to the claims of creditors *unless* that property is in some manner exempt from creditors by the Florida Constitution or state or federal statute.

B. Specifics of the proposed legislation

1. Definitions - Proposed new §733.6075(1)

Definitions applicable to §§ 733.607, 733.702, 733.705, and 733.707 are set forth in new §733.6075(1).

§733.6075. Liability of Non-probate Transferees for Enforceable Claims

(1) For purposes of this section and ss. 733.607, 733.702, 733.705, and 733.707, the term:

(a) “Creditor representative”⁴ means any person, including a creditor with an enforceable claim,⁵ appointed by the court pursuant to s.733.6075(3). The creditor representative is a fiduciary who owes fiduciary duties to all unpaid creditors with enforceable claims.

(b) “Decedent’s interest” means that portion of an asset, including the whole, which the decedent had, immediately before death, the right to withdraw or use without the consent of, or duty to account to any person.⁶

(c) “Enforceable claim” means a claim of a creditor of the decedent which was timely filed in the probate proceeding and would be paid from the assets of the decedent’s probate estate or a trust described in s. 733.707(3), if sufficient assets existed to pay the claim in full. It does not include contingent claims.

(d) “Exempt property” means property or an interest in property that is exempt by law from claims of creditors, including but not limited to:⁷

1. Protected homestead as defined in the Florida Probate Code,
2. Exempt property as described in the Florida Probate Code,
3. Property or accounts held in tenancy by the entirety,

⁴ The term “administrator ad litem,” which is used in the Probate Code, was considered and rejected because it may imply greater authority or responsibility than intended in this proposed legislation and result in unintended consequences.

⁵ Any creditor appointed to pursue non-exempt, non-probate assets should be a non-contingent creditor with an enforceable claim against decedent’s estate because a contingent creditor should not have access to pre-judgment discovery of decedent’s assets.

⁶ This definition uses the same concept and language similar to §732.2035(2) of the Elective Share statute, except this definition is not limited to accounts or securities as the Elective Share definition is.

⁷ There is no intention to reduce or limit existing exemptions.

References to specific statutes are omitted in favor of a general reference to the Florida Probate Code to avoid having to make amendments if the statutes are amended or renumbered in the future.

4. Property exempt from the claims of creditors under Chapter 222, and

5. Property exempt from the claims of creditors under federal law.

(e) “Non-exempt property” means property that is not described in subsection (d), above.

(f) “Non-probate asset” means the decedent’s interest in non-exempt property, other than real property⁸, passing to a transferee by means other than by will, intestate succession, or power of appointment which is only effective at death.⁹

(g) “Non-probate transfer” means a valid transfer of a non-probate asset effective at death, to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation, withdrawal, or otherwise, and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.

2. Proposed §733.6075(2) is the essence or “guts” of the proposal. It provides:

§733.6075. Liability of Non-probate Transferees for Enforceable Claims

* * * *

(2) Except as otherwise provided by statute, a transferee of a non-probate transfer is liable to the decedent’s estate for the enforceable claims of creditors against the decedent’s estate to the extent the probate estate and all trusts described in s. 733.707(3) are insufficient to satisfy those claims. The liability of a non-probate transferee shall not exceed the value of the decedent’s interest as of date of death in the non-probate transfers received or controlled by that transferee, and no lien shall attach to the non-probate asset. In lieu of paying the amount for which the transferee

⁸ The real property members of the RPPTL section are almost unanimously opposed to this proposed legislation being applicable to real estate. Although the intent is to limit liability to the transferee, they believe that there will be significant title issues created if real estate is subject to this legislation. The UPC provision, 6-102(1)(a), also excludes real estate.

⁹ A power to withdraw should be a non-probate asset subject to creditors’ claims. For example, if a decedent had a power to withdraw which had not lapsed at his/her death, then the property which the decedent had the right to withdraw was reachable by his creditors during his/her life and should be subject to the payment of claims after death.

of a non-probate transfer is liable, a transferee of a non-probate asset may:

(a) Contribute the decedent's interest in the non-probate asset received or controlled by that transferee, or

(b) If the non-probate asset has been sold or exchanged prior to the transferee's receipt of the personal representative's or creditor representative's certification described in s. 733.607(5)(a), pay an amount equal to the value of the decedent's interest in the non-probate asset on the date of sale or exchange, less reasonable costs of sale.¹⁰

3. Order of abatement - Proposed amendment to add §733.607(5)

The proposed legislation designates the order in which a decedent's assets will be used to pay creditors' claims as follows: first is the probate estate, second is any revocable trust, and last is any non-exempt, non-probate assets. Section §733.607, Florida Statutes, is amended to add the following:

§733.607. Possession of the estate.

* * * *

(5)(a) If the assets of the decedent's estate and all trusts described in s. 733.707(3), are insufficient to pay the expenses of administration, obligations of the decedent's estate, and enforceable claims of creditors, the personal representative or creditor's representative is entitled to payment from the transferee of the decedent's non-probate assets in the amount the personal representative or creditor representative certifies in writing to be required to satisfy the insufficiency and shall pay from the funds or assets received from the transferee of the decedent's non-probate assets the enforceable claims of creditors in the order set forth below after all probate assets and assets of all trusts described in s. 733.707(3) available to pay enforceable claims have been exhausted:¹¹

¹⁰ The last sentence in subsection (2) is similar in concept to 732.2085(2) in the elective share statute and allows a transferee to contribute the decedent's interest in the non-probate asset or the proceeds from the sale of the non-probate asset sale (less reasonable costs of sale) in lieu of the value of the decedent's interest at date of death. These options will provide protection to the transferee of the decedent's interest in tangible personal property which may have declined in value or may have been sold before the transferee had knowledge of the insolvency of the decedent's estate.

¹¹ Subsection (5) is similar to 733.607(2), regarding payments from the trustee of revocable trusts. However, subsection (2) uses "obligations of the decedent's estate." The

1. Class 1 - Reasonable funeral, interment, and grave marker expenses, whether paid by a guardian, the personal representative, or any other person, not to exceed the aggregate of \$6,000.

2. Class 2 - Debts and taxes with preference under federal law, and claims pursuant to ss. 409.9101 and 414.28.

3. Class 3 - Reasonable and necessary medical and hospital expenses of the last 60 days of the last illness of the decedent, including compensation of the persons attending the decedent.

4. Class 4 - Arrearage from court-ordered child support.

5. Class 5 - All other claims, including those founded on judgments or decrees rendered against the decedent during the decedent's lifetime, and any excess over the sums allowed in subparagraph 1.¹²

(b) After paying any preceding class, if the value of the decedent's interest in non-probate assets is insufficient to pay all of the next succeeding class, the creditors of the latter class shall be paid ratably in proportion to their respective claims.¹³

4. The personal representative

The proposed process starts with the personal representative, but great care was taken over several years of drafting to limit the duties of the personal representative, protect the personal representative from liability, and give the personal representative the option of opting out of the process very early in the probate proceeding.

Committee decided to use the term "enforceable claims" in subsection (5) to make it clear that non-probate, non-exempt assets are not to be used to pay elective share, pretermitted spouse, pretermitted child, family allowance, or general expenses of administration unrelated to the collection of non-probate assets.

¹² The purpose of this proposed legislation is to create an orderly procedure to pay from the decedent's interest in non-exempt, non-probate assets only those creditors with enforceable claims who could have reached decedent's interest in those assets during his/her life. The description of the creditors to be paid and order of payment is the same as under 733.303, but excludes post-death obligations because those creditors would have had no right to decedent's non-probate assets during his/her life and statutory entitlements (see footnote 8).

¹³ Same language as F.S. 733.707(2).

a. Proposed amendment to add §733.607(3) allows the personal representative to “opt out.”

The personal representative may “opt out” as early as immediately after appointment, and there is no deadline by which the personal representative must decide whether to “opt out.”

§733.607. Possession of the estate.

* * * *

(3) At any time after the entry of an order appointing a personal representative, the personal representative may file a notice stating that the personal representative will not exercise the powers described in s. 733.6075. That notice shall be served upon all interested persons, including unpaid creditors of the decedent with enforceable claims.

b. Proposed amendment to add §733.607(4) - Regardless of whether the personal representative has previously “opted out,” after the claims period the personal representative must notify interested persons if the assets of the decedent’s estate and all revocable trusts, are or may be insufficient to pay the enforceable claims of creditors. Because the solvency of the estate may depend upon the outcome of a disputed claim or the value of a particular asset, the personal representative is not required to make a determination that the estate is or is not solvent, but is permitted to notify creditors if an insolvency is possible. The duty to make an assessment regarding the solvency of the estate is upon the personal representative because that is the person with access to the most information regarding the decedent’s assets and liabilities.

The notice is designed to also advise creditors whether the decedent may have had an interest in non-exempt, non-probate assets and whether the personal representative has “opted out” of the responsibility to pursue those assets on behalf of creditors.

§733.607. Possession of the estate.

* * * *

(4) On or before 4 months from the date of first publication of the notice to creditors, if the assets of the decedent's estate and all trusts described in s. 733.707(3) are or may be insufficient to pay the enforceable claims of the decedent's estate, the personal representative shall file a notice of insufficiency stating that the assets of the decedent's estate and all trusts described in s. 733.707(3) are or may be insufficient to pay the expenses of administration, obligations of the decedent’s estate, and enforceable claims of

creditors.¹⁴

(b) The notice shall, so far as is known¹⁵ by the personal representative at the time the notice is served,:

1. State whether the assets of the estate and any trusts described in s. 733.707(3) are sufficient to pay the known enforceable claims of creditors or whether that information is unknown,

2. State whether the decedent had an interest at the time of death in any non-exempt, non-probate assets other than those assets held in a trust described in s. 733.707(3), and

3. Be served upon all interested persons, including unpaid creditors of the decedent with enforceable claims and holders or transferees of decedent's non-exempt, non-probate assets.¹⁶

(c) If the personal representative has filed a notice stating that the personal representative will not exercise the powers described in s. 733.6075, a copy of that notice shall be served with the notice of insufficiency.

(d) The information required by this paragraph may be contained in the notice to creditors or in a separate document.

c. If the personal representative opts out - Proposed new §733.6075(3)

If the personal representative opts out, a creditor representative may be appointed to exercise the powers to search for and recover the decedent's interest in non-exempt, non-probate assets on behalf of the estate.

¹⁴ The personal representative may opt out early, but must still notify creditors of an insufficiency or possible insufficiency. The burden is upon the creditor to inquire as to the existence or extent of any non-exempt, non-probate assets.

¹⁵ Throughout the proposed legislation, the personal representative is only obligated to disclose "known" information. The Committee rejected the concept of "know or reasonably should know or have known" because of the increased risk of litigation against the personal representative.

¹⁶ The notice to holders can be viewed as a "notice to the transferees to spend" or a "notice to alert them of the possible need for the assets and assist them in avoiding the transferee liability imposed by the statute." The Committee decided to notify the transferee to protect innocent transferees from spending assets for which they may incur later liability.

The creditor representative may:

- be a creditor with an enforceable claim
- be appointed at any time prior to the entry of an order of discharge.

Because the solvency of the estate may not be known until the petition for discharge is filed, the proposed legislation permits a creditor with an enforceable claim that has not been paid in full to object to discharge and be given a reasonable time to pursue the rights and remedies created under the proposed legislation.

§733.6075. Liability of Non-probate Transferees for Enforceable Claims

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(3) In the event that the personal representative elects not to exercise the powers under this section or is subsequently relieved of that duty, the court may appoint any person, including a creditor with an enforceable claim, as a creditor representative to exercise those powers in the name of the estate against the transferee of the decedent's interest in those assets. A creditor representative may be appointed at any time prior to the entry of an order of discharge. A creditor with an enforceable claim that has not been paid in full may:

* * * *

(c) Object to discharge and may be given reasonable time to pursue the rights and remedies under this section.

d. If the personal representative is a transferee of a decedent's non-probate asset - Proposed new §733.7065(8)

§733.6075. Liability of Non-probate Transferees for Enforceable Claims

* * * *

(8) In the event that the personal representative elects to exercise the powers described in this section and is a transferee of a decedent's non-probate asset which is recoverable under this section, the court may appoint an administrator ad litem to represent the estate in a proceeding against the personal representative as transferee of a decedent's non-probate asset.

5. Identifying a decedent's non-exempt, non-probate assets -
Proposed new §733.6075(4) and (5)

§733.6075. Liability of Non-probate Transferees for Enforceable Claims

* * * *

(4) The personal representative or, if the personal representative has filed the notice that he or she will not exercise the powers under this section, the creditor representative, shall make a diligent search to determine whether at the time of death, the decedent had an interest in any non-probate assets. Impracticable and extended searches are not required.¹⁷

(a) If the personal representative or creditor representative, after diligent search, fails to locate a non-probate asset as required by this section, the personal representative or creditor representative is not liable to any person or entity for the failure.¹⁸

(b) If a non-probate asset exists but is not discovered during the administration of the estate and creditors with enforceable claims against the decedent's estate were not paid in full, those creditors are not precluded from reopening the estate and pursuing the non-exempt assets, except as provided in s.733.702(1).

(5) All banks and financial institutions doing business in this state shall, upon the presentation of a certified copy of letters of administration or order appointing creditor representative, furnish the personal representative or creditor representative the following information or documentation for all accounts in

¹⁷ This language is similar to F.S. 733.2121(3)(a) & (c) regarding search for and notice to creditors.

It is contemplated that any costs associated with this search shall be an ordinary expense of administration because such information is generally discovered during the administration of an estate and such a search is necessary in connection with determining any estate tax liability.

¹⁸ The Committee discussed whether to include a requirement of good faith in this subsection and decided not to do so because the similar statute requiring the personal representative to make a diligent search for creditors does not have a good faith requirement. The duty to search for non-probate assets is intended to be equal to the duty to search for creditors. A diligent search would, in most cases, include reviewing the decedent's tax returns and mail.

which the decedent had an interest on the date of his or her death: account number, account title, copy of signature card or other account opening documentation, account balance on the date of decedent's death, and any information reasonably necessary to determine the decedent's interest.¹⁹

6. Freezing or securing the decedent's interest in non-exempt, non-probate assets - Proposed new §733.6075(3) and (9)

Section 6-102(i) of the Uniform Probate Code includes the following provision:

Unless a written notice asserting that a decedent's probate estate is nonexistent or insufficient to pay allowed claims and statutory allowances has been received from the decedent's personal representative, the following rules apply:

(1) Payment or delivery of assets by a financial institution, registrar, or other obligor, to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered.

Although such a provision would be useful to freeze accounts in which a decedent had an interest, the provision poses several potential problems, including:

- the manner in which the notice must be given to the financial institution,
- whether freezing an account without a court order violates due process, and
- who would have the obligation of managing/protecting securities while they are frozen.

Since Florida law presently includes methods for freezing assets, the problematic UPC provision was rejected and methods existing under Florida law are specifically incorporated into the proposed legislation, including §69.031, Florida Statutes.

§733.6075. Liability of Non-probate Transferees for Enforceable Claims

* * * *

(3) A creditor with an enforceable claim that has not been paid in full and who has received notice that the assets of the decedent's estate and all trusts described in s. 733.707(3) are or may be insufficient to pay its enforceable claim(s), may:

¹⁹ The Committee decided it was not necessary to add a time frame for the bank's compliance pursuant to 733.6075(5).

(a) Use the discovery available under the probate rules to determine whether the decedent had an interest at the time of death in any non-exempt, non-probate assets, the nature of those assets, the value of the decedent's interest, and the name and address of the non-probate transferees of each of those assets.

(b) Request and receive from the personal representative any information concerning non-exempt, non-probate assets in which the decedent may have had an interest, known to, or which in the course of administration of the estate becomes known to, the personal representative, including the nature of the assets, the value at the date of the decedent's death, the value of the decedent's interest, and the name and address of the transferee.

(c) Object to discharge and may be given reasonable time to pursue the rights and remedies under this section.

* * * *

(9) A personal representative or creditor representative may utilize procedures under s.69.031 for non-probate assets and any other remedies available under law.

7. Transferee's obligations and rights

a. Pay to the personal representative or creditor representative the amount required to pay enforceable claims - Proposed new §733.6075(6)

§733.6075. Liability of Non-probate Transferees for Enforceable Claims

(6) A transferee of a decedent's non-probate asset shall pay to the personal representative of the decedent's estate or the creditor representative any amounts that the personal representative or creditor representative certifies in writing to the transferee are required to pay the enforceable claims of the decedent's estate. . . .²⁰

b. Transferee is liable for the value of decedent's interest in non-exempt, non-probate assets, i.e., transferee liability - Proposed amendment to add

²⁰ The Committee voted not to require the personal representative and creditor representative to seek pro-rata payment from all transferees of the decedent's non-probate assets. It was determined that such a requirement would be unduly burdensome and unreasonable to impose upon the personal representative or creditor representative. Instead, a transferee who is required to pay more than his/her pro-rata share may seek contribution from other transferees.

§733.707(4)

733.707. Order of payment of expenses and obligations

(1) The personal representative shall pay the expenses of the administration and obligations of the decedent's estate in the following order:

* * * *

(3) Any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (e), either alone or in conjunction with any other person, is liable for the expenses of the administration and obligations of the decedent's estate to the extent the decedent's estate is insufficient to pay them as provided in s. 733.607(2).

* * * *

(4) Any portion of a non-probate asset with respect to which a decedent had an interest immediately prior to death is liable for enforceable claims of the decedent's estate to the extent the decedent's estate and any trusts described in s. 733.707(3) are insufficient to pay them as provided in s. 733.607(5) and s. 733.607(2).

c. Transferee who is required to contribute to the payment of enforceable claims has the right to challenge a creditor's claim, even if the time for objection to claims has expired - Proposed amendment to add §733.705(12)

733.705. Payment of and objection to claims

* * * *

(12) Notwithstanding any other provision of this section, a transferee of the decedent's non-probate asset shall have the right to assert any defense to liability as to a claim against the decedent in an action to recover all or any portion of the decedent's non-probate asset from the transferee without the filing of an objection to the claim in the probate proceeding, and the creditor whose claim is challenged shall be joined as a third party if that creditor is not otherwise a party. This subsection shall not apply to:

(a) A transferee of the decedent's non-probate asset who is also a beneficiary as defined in s. 731.201 as of the decedent's date of death, and

(b) A claim which has been judicially determined to be valid in an independent action.

d. Transferee who is required to pay more than a pro-rata share has a right of contribution against other transferees - Proposed new §733.6075(6)

§733.6075. Liability of Non-probate Transferees for Enforceable Claims

* * * *

(6) . . . If the decedent had an interest at the time of death in more than one non-probate asset, the personal representative or creditor representative is not required to seek pro-rata payment from all transferees of the decedent's non-probate assets, and a transferee of a decedent's non-probate asset who is required to pay all or any part of the decedent's interest to the personal representative or creditor representative in excess of that transferee's pro-rata share may seek contribution from other transferees of such assets.

8. Fees and costs - Proposed new §733.6075(7) and (10)

§733.6075. Liability of Non-probate Transferees for Enforceable Claims

* * * *

(7) No expenses or obligations described in s. 733.707(1)(a), (e), and (g) shall be paid from a decedent's non-probate assets except those expenses, including any costs and attorney's fees, incurred in connection with obtaining payment from a transferee.

* * * *

(10) The court shall award taxable costs as in chancery actions, including attorney's fees, in all actions for the recovery of the value of the decedent's interest in non-probate asset(s), and in actions by transferees to enforce contribution.²¹

9. Currently, transferees of a decedent's interest in non-exempt, non-probate assets are not protected by the limitation on claims. Consistent with the proposed legislation to provide for the payment of enforceable creditors' claims from a

²¹ This provision is intended to apply when the personal representative or creditor representative has to file an action to determine or collect the decedent's interest in non-exempt, non-probate assets. Fees for searching for such assets and certifying the need for such assets to pay enforceable claims is an ordinary expense of administration.

This provision may result in the estate paying a transferee's attorney's fees for the unsuccessful attempt by the personal representative to recover non-probate assets. It would also be applicable in disputes over the value of the decedent's interest in non-probate assets.

decedent's non-exempt, non-probate assets if the probate estate and any revocable trust are insufficient to pay all of those claims, all creditors should be required to file a claim in the probate proceeding (and be paid through that process) and transferees should be protected from creditors seeking recovery outside the probate process.

The following amendment to § 733.702(1) is proposed to accomplish those purposes:

§733.702. Limitations on presentation of claims

(1) If not barred by s. 733.710, no claim or demand against the decedent's estate or against any of the decedent's non-probate assets that arose before the death of the decedent, including claims of the state and any of its political subdivisions, even if the claims are unmatured, contingent, or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative; and no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent, is binding on the estate, on the personal representative, or on any beneficiary or transferee of the decedent's non-probate assets unless filed in the probate proceeding 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, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise. The personal representative may settle in full any claim without the necessity of the claim being filed when the settlement has been approved by the interested persons.

10. The proposed legislation will be effective for all decedents dying on or after January 1, 2016.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR - None.

VI. CONSTITUTIONAL ISSUES - None.

V. OTHER INTERESTED PARTIES

Elder Law Section of The Florida Bar (Opposed).

The Florida Bankers Association (No Position).

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Angela M. Adams, Chair, Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets of the Real Property, Probate and Trust Law Section

Address 540 Fourth Street, N., St. Petersburg, FL 33701
Telephone: (727) 821-1249, Email: amemadams@gmail.com

Position Type Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets of the RPPTL Section of The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

William T. Hennessey, Gunster, Yoakley & Stewart P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL, Telephone: (561) 650-0663, Email: whennessey@gunster.com

Deborah Packer Goodall, Goldman, Felcoski & Stone, P.A., 327 Plaza Real, Suite 230, Boca Raton, FL 33432, Telephone: (561) 395-0400, Email: dgoodall@gfsestatelaw.com

Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone: (850) 222-3533

Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, Telephone: (850) 222-3533

Appearances

Before Legislators N/A at this time

(List name and phone # of those having face to face contact with Legislators)

Meetings with

Legislators/staff N/A at this time

(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable,

List The Following N/A at this time

(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

Support the creation of an orderly process for the payment of enforceable claims of creditors from a decedent's interest in non-exempt, non-probate assets when the decedent's probate estate and any revocable trust as to which the decedent was the grantor are insufficient to pay all enforceable claims

including: (a) the enactment of new F.S. §733.6075 (liability of non-probate transferees for enforceable claims); (b) the amendment of F.S. §733.607 (possession of estate) by the addition of new subsections (3), (4), and (5); (c) the amendment of F.S. §733.702(1) (limitations on presentation of claims); (c) the amendment of F.S. §733.705 (payment of and objection to claims) by the addition of a new subsection (12); and (d) the amendment of F.S. § 733.707 (order or payment of expenses and obligations) by the addition of a new subsection (4).

Reasons For Proposed Advocacy:

Florida's Probate Code and Florida's Trust Code provide the framework for the orderly administration of decedents' probate and trust assets, including the identification, verification, and payment of creditors' claims. Under Florida's long-established probate system and public policy, distribution is made to a decedent's beneficiaries or heirs only after all expenses of administration, taxes, and the decedent's debts are paid.

However, this public policy is being thwarted in certain cases because of the increased popularity of "will substitutes" or non-probate transfers which allow a decedent's assets to pass by operation of law, outside of the probate process and the framework established for the payment of a decedent's debts. Specific examples of these "will substitutes" or non-probate transfers are: property registered as transfer-on-death, pay-on-death accounts, Totten Trust accounts (also known as tentative trusts, "in trust for," or "ITF" accounts), and assets held as joint tenants with right of survivorship. A decedent's interest in these non-probate assets passes at the decedent's death by operation of law to the named transferee or joint tenant, and is not part of the decedent's probate estate from which creditors are to be paid under the framework of Florida's probate system.

There is no doubt that during a person's life, his or her creditors can reach that person's interest in non-exempt, non-probate assets such as those described above. However, there is confusion and disagreement among practitioners and the public as to whether, after a debtor's death, the creditors of the now-deceased debtor (the decedent) can reach the decedent's interest in non-exempt, non-probate assets passing by operation of law. Even if a decedent's creditors can presently reach a decedent's interest in some non-exempt, non-probate assets, there are other problems under the existing situation, including the following:

1. Transferees of a decedent's non-exempt, non-probate assets inherit while creditors with enforceable claims are not paid if probate and revocable trust assets are insufficient.
2. Transferees of a decedent's non-exempt, non-probate assets are unaware of their potential liability to decedent's creditors.
3. Given that a personal representative owes duties to all interested persons, including unpaid creditors, does a personal representative of an insolvent estate who knows that the decedent had an interest in non-exempt, non-probate assets owe unpaid creditors a duty to collect these assets for the benefit of unpaid creditors? Does a personal representative who fails to advise unpaid creditors of such assets incur any liability?
4. As between creditors, (1) each is on its own to discover and pursue a decedent's interest in non-exempt, non-probate assets, creating a race among creditors to discover and recover from non-probate assets, and (2) creditors that should be in the same class will not be treated equally (e.g., a judgment creditor may pursue a non-probate transferee and be paid from the decedent's interest in that non-exempt, non-probate assets, while other judgment creditors go unpaid).
5. Non-probate transferees are treated unfairly as between each other. For example, one non-probate transferee may be pursued by a creditor and have to pay the decedent's debt while other non-probate transferees retain their benefits without any obligation of contribution.
6. The 3-month (§733.702) and 2-year (§733.710) non-claim statutes do not bar claims against the transferee of a decedent's interest in non-probate assets. Accordingly, creditors may pursue the transferees of the decedent's interest in non-exempt, non-probate assets, outside of probate and these time bars.

The proposed legislation addresses the above-described issues and inequities by establishing an orderly process for the payment of legitimate, enforceable creditors' claims from a decedent's interest in non-exempt, non-probate assets when the decedent's probate estate and any revocable trusts are insufficient to pay all creditors. The proposed procedure is similar to the existing procedure where a decedent's revocable trust must pay creditors when the probate estate is insufficient. See §§733.607, 733.707 and 736.05053, Florida Statutes.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others

(May attach list if more than one)

NONE
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Elder Law Section of The Florida Bar Oppose
(Name of Group or Organization) (Support, Oppose or No Position)

Florida Bankers Association No Position
(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.