

ELECTIVE SHARE MADE EASY

Page#	Topic	Statute/Rule
1	Index	
2 - 3	Introduction	
3 - 4	I – Procedure, Time Periods & Forms	§732.2135, F.S. Fla. Prob. R. 5.360
4 - 6	II - Inclusions	§732.2035, F.S.
6 - 7	III - Exclusions	§732.2045, F.S.
7 - 9	IV - Satisfaction	§732.2075(1), F.S.
9 - 10	V - Apportionment	§732.2075(2), F.S.
10	VI - Contribution	§732.2085, F.S.
10 -11	VII - Enforcement	§732.2145, F.S.
11 - 13	Footnotes	
13 - 24	§§732.201 – 732.228, F.S. (2022)	
25 - 26	Fla. Pro. R. 5.360. Elective Share (2022)	
27	Attorney’s Fees	§732.2145(4), F.S. §732.2151, F.S.

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INTRODUCTION

This is a seven-part outline regarding Florida's elective share. Part I pertains to the relevant time periods and forms associated with the elective share; Part II pertains to the property included in the elective estate ("inclusion amount"); Part III pertains to the property excluded from the elective estate (exclusion amount"); Part IV pertains to the value of assets passing to or for the benefit of the surviving spouse ("satisfaction amount"); Parts V and VI pertain to the beneficiaries' liability for the unsatisfied balance of the elective share ("apportionment and contribution"); and Part VII pertains to enforcement of the contribution amount.

What is an "elective share"? The surviving spouse of a person who dies domiciled in Florida has the right to claim a portion of the deceased spouse's estate known as the "elective share", as opposed to the estate subject to administration. The elective estate encompasses not only the decedent's probate estate but also a variety of non-probate transfers such as trust assets, joint ownership, and POD/beneficiary designations.

Once the petition for the elective share is filed, the court must determine the amount of the elective share by calculating 30% of the fair market value of all of the deceased spouse's property that is subject to the elective estate. The elective share is exclusive of the surviving spouse's separate property and exempt estate assets such as claims, liens, and security interests.

Next, the court must determine whether the value of assets passing to or for the benefit of the surviving spouse is greater than (>) or less than (<) the amount of the elective share.

If the value of assets passing to or for the benefit of the surviving spouse is less than the amount of the elective share, the elective share is payable from assets passing under the will, the revocable trust, and from other recipients of the elective share property.

Once the elective share is satisfied, the remaining estate assets are distributed as though the surviving spouse had predeceased the decedent.

Elective Share Formula:

1. Determine the amount included in elective estate
2. Determine the amount excluded from the elective estate
3. Elective Share = (property subject to the elective estate) x (30%)
4. Determine the amount satisfying the elective share (i.e., the value of assets passing to or for the benefit of the surviving spouse)
5. If the satisfaction amount is greater (>) than the amount of the elective share, then there is no elective share (it has been satisfied). Alternatively, if the satisfaction amount is less (<) than the amount of the elective share, then there is an elective share; however, that amount is reduced by the satisfaction amount.

6. If the satisfaction amount is less than the amount of the elective share, the unsatisfied balance is allocated into categories/classes and apportioned among the direct recipients of the remaining elective estate according to a priority system. The direct recipients are liable to contribute their share of the remaining elective estate toward satisfaction of the elective share in an amount equal to the value of their proportional liability in each category or class.

I. PROCEDURES, TIME PERIODS & FORMS

The following procedures and time periods apply to an elective share:

Time of Election: An election to take the elective share must be filed on or before the earlier of the date that is 6 months after the date of service of a copy of the notice of administration, or the date that is 2 years after the date of the decedent's death. §732.2135(1), F.S. However, you may petition the court for an extension of time for making an election. §732.2135(2) & (4), F.S. Form No. P-4.0540. Upon receipt of the petition, the personal representative must promptly serve a copy of the petition by formal notice on all interested persons. Fla. Prob. R. 5.360(a)(2)(B).

Withdrawal of Election: An election may be withdrawn at any time within 8 months after the decedent's death and before the court's order of contribution. §732.2135(3), F.S.

Notice of Election: Upon receipt of an election, the personal representative must serve the election and the notice of election within 20 days following service of the election on all interested persons in the manner provided for service of formal notice. Fla. Prob. R. 5.360(b)(3). Form No. P-4.0545.

Objection to Election: Within 20 days after service of the notice of election, an interested person may serve an objection to the election. Fla. Prob. R. 5.360(b)(3)(B) and 5.360(b)(4).

Order Determining Entitlement to the Elective Share: (a) If no objection to the election is timely served, the court may enter an order determining the spouse's entitlement to the elective share. (b) If an objection to the election is timely served, the personal representative must serve the objection on all interested persons and the court must determine the surviving spouse's entitlement to the elective share after notice and hearing. Fla. Prob. R. 5.360(b)(4) & (c). Form No. P-4.0555.

Petition to Determine the Amount of the Elective Share: After entry of an order determining entitlement to the elective share, the personal representative must file and serve an elective estate inventory and a petition to determine the amount of the elective share within 60 days after entry of the order determining entitlement to the elective share. If the personal representative does not file the petition within 90 days from rendition of the order of entitlement, the electing spouse or the attorney-in-fact or the guardian of the property or personal representative of the electing spouse may file the petition specifying as particularly as is known the value of the elective share. Fla. Prob. R. 5.360(d). Form No.'s P-4.0560 (contribution not required) and P-4.0570 (contribution required).

Objection to Amount of Elective Share: Within 20 days after service of the petition to determine the amount of the elective share, an interested person may serve an objection to the amount of or distribution of assets to satisfy the elective share. Fla. Prob. R. 5.360(d)(4).

Determination of Amount of Elective Share and Contribution: (a) If no objection is timely served to the petition to determine the amount of the elective share, the court must enter an order on the petition. (b) If an objection is timely served to the petition to determine the amount of the elective share, the court must determine the amount of the elective share and contribution after notice and hearing. Fla. Prob. R. 5.360(d)(5). Form No.'s P-4.0565 and P-4.0575.

II. INCLUSIONS

To determine the surviving spouse's elective share, the first step is to determine the value of what is included in the elective estate. Unless stated otherwise, the valuation of each of the following categories is the fair market value on the date of the decedent's death. The following nine categories of property are included in the elective estate:

1. The decedent's probate estate. [§732.2035(1), F.S.] The probate estate includes all of the decedent's property wherever located that is subject to estate administration in any state of the United States or in the District of Columbia. See §732.2025(7), F.S. Exceptions: The probate estate does not include claims against the estate (including funeral expenses), mortgages, liens, and security interests. See §732.2055(4), F.S.

2. Protected homestead. [§732.2035(2), F.S.] Previously, homestead property was specifically excluded from the elective estate. Effective July 1, 2017, "protected homestead" property is expressly included in the elective estate [§732.2035(2)], unless the surviving spouse has waived his or her homestead rights [§732.2045(1)(i)]. If the homestead passes to the surviving spouse in fee simple, it's valued at its fair market value on the date of the decedent's death, but if the surviving spouse takes a life estate or an undivided one-half interest in the homestead, it's valued at one-half of its fair market value on the decedent's death date [§§732.2055(1) & 732.2095(2)].

3. Co-ownership, POD's, and similar arrangements. [§732.2035(3), F.S.] This category includes the decedent's ownership interest in bank/brokerage accounts and securities registered in "Pay On Death," "Transfer On Death," "In Trust For," or co-ownership with right of survivorship form. The term "decedent's ownership interest" means, in the case of accounts or securities held in tenancy by the entirety, one-half of the value of the account or security, and in all other cases, that portion of the accounts or securities which the decedent had, immediately before death, the right to withdraw or use without the duty to account to any person.

4. Fractional interest in property. [§732.2035(4), F.S.] This category includes the decedent's fractional interest in real and personal property (exclusive of categories 3 and 8) held by the decedent in joint tenancy with right of survivorship or in tenancy by the entirety. The term "fractional interest" means the value of the property divided by the number of tenants; it is immaterial whether the decedent contributed some, all or none of the consideration for the property.

5. Revocable interests. [§732.2035(5), F.S.] This category includes property (exclusive of categories 2 and 3) transferred by the decedent to the extent that at the time of the decedent's death, the transfer was revocable by the decedent alone or in conjunction with any other person. This category includes revocable trusts as defined in §732.2025(9), F.S. Exception: This subsection

does not apply to a transfer that is revocable by the decedent only with the consent of all persons having a beneficial interest in the property.

6. Irrevocable transfers by and for the decedent. [§732.2035(6), F.S.] This category includes that portion of property (exclusive of categories 2, 4, 5 and 8) transferred by the decedent to the extent that at the time of the decedent's death the decedent possessed the right to, or in fact enjoyed the possession or use of, the income or principal of the property. Typical examples include a transfer to: (i) a personal residence trust, or (ii) a pooled income fund, or (iii) a trust where the decedent retained an annuity or unitrust interest. The amount included is the value of the portion of the property to which the decedent's right or enjoyment related, to the extent the portion passed to or for the benefit of any person other than the decedent's probate estate.¹ Refer to the exceptions in (6)(c).

7. Life insurance. [§§732.2035(7) & 732.2055(1), F.S.] This category includes the decedent's beneficial interest in the net cash surrender value immediately before death of any policy of insurance on the decedent's life.

8. Retirement plans. [§732.2035(8), F.S.] This category includes amounts payable to or for the benefit of any person by reason of surviving the decedent under any public or private pension, retirement, or deferred compensation plan, or any similar arrangement. Exceptions: This category does not apply to: (i) benefits payable under the federal Railroad Retirement Act or the federal Social Security System; and (ii) in the case of a defined contribution plan as defined in s. 414(i) of the Internal Revenue Code of 1986, as amended, the excess of the proceeds of any insurance policy on the decedent's life over the net cash surrender value of the policy immediately before the decedent's death.

9. Transfers within one year preceding date of death. [§732.2035(9), F.S.] This category includes the following two distinct categories relating to transfers by the decedent within the one-year period immediately preceding death: (a) The first category includes the value of any property transferred as a result of the termination of a right or interest in, or power over property that would have been included in the elective estate under categories 5 or 6 if the right, interest, or power had not terminated until the decedent's death;³ and (b) The second category includes, with exceptions, any transfer of property to the extent not otherwise included in the elective estate, made to or for the benefit of any person.⁴

10. Property transferred in satisfaction of the elective share. [§732.2035(10), F.S.] This category includes transfers to an elective share trust as defined in §732.2025(2), F.S. **Comment:** One of the benefits of creating and funding an elective share trust is that it provides a decedent with some certainty with respect to satisfaction of the elective share. The value of the spouse's interest is a percentage of the value of the principal of the trust, or trust portion, on the applicable valuation date as follows: (1) 100% if the trust instrument includes both a qualifying invasion power and a qualifying power of appointment; (2) 80% if the trust instrument includes a qualifying invasion power but no qualifying power of appointment; (3) 50% in all other cases. §732.2095(2)(b), F.S.

III. EXCLUSIONS

Once you have made the initial determination as to what property is included in the elective estate, the next step is to determine what, if any, exclusions apply. The following fourteen categories of property are excluded from the elective estate:

(a) Prior irrevocable transfers. [§732.2045(1)(a), F.S.] This category excludes from the elective estate any transfer of property by the decedent to the extent the transfer is irrevocable before October 1, 1999 **5** or after that date but before the date of the decedent's marriage to the surviving spouse. Exception: Transfers to an elective share trust made prior to October 1, 1999. These transfers are treated as if they were made after October 1, 1999 and in satisfaction of the elective share. §732.2155(4), F.S.**6**

(b) Transfers for adequate and full consideration. [§732.2045(1)(b), F.S.] This category excludes from the elective estate any transfer of property by the decedent to the extent the decedent received adequate consideration in money or money's worth for the transfer.

(c) Transfers with the written consent of spouse. [§732.2045(1)(c), F.S.] This category excludes from the elective estate any transfer of property by the decedent made with the written consent of the decedent's spouse. Exception: Spousal consent to split-gift treatment under the United States gift tax laws does not constitute written consent to the transfer by the decedent.

(d) Life insurance in excess of the net cash surrender value. [§732.2045(1)(d), F.S.] This category excludes from the elective estate the proceeds of any policy of insurance on the decedent's life in excess of the net cash surrender value of the policy whether payable to the decedent's estate, a trust, or in any other manner.

(e) Life insurance maintained pursuant to court order. [§732.2045(1)(e), F.S.] This category excludes from the elective estate any policy of insurance on the decedent's life maintained pursuant to a court order.

(f) Decedent's one-half of community property. [§732.2045(1)(f), F.S.] This category excludes from the elective estate the decedent's one-half of the property to which §§732.216-732.228, or any similar provisions of law of another state, apply and real property that is community property under the laws of the jurisdiction where it is located.

(g) Qualifying special needs trusts. [§732.2045(1)(g), F.S.] This category excludes from the elective estate property held in a qualifying special needs trust as defined in §732.2025(8), F.S. on the date of the decedent's death.

(h) General power of appointment. [§732.2045(1)(h), F.S.] This category excludes from the elective estate property included in the gross estate of the decedent for federal estate tax purposes solely because the decedent possessed a general power of appointment as defined in §732.2025(3), F.S.

(i) Waiver of homestead property. [§732.2045(1)(i), F.S.]⁷ This category excludes from the elective estate property which constitutes the protected homestead of the decedent if the surviving spouse validly waived his or her homestead rights as provided under s. 732.702, or otherwise under applicable law, and such spouse did not receive any interest in the protected homestead upon the decedent's death.

(j) Certain property held in trust. [§732.2155(6), F.S.] This category excludes from the elective estate property held in a revocable or irrevocable trust at the decedent's death if: (a) The property was an asset of the trust at all times from October 1, 1999 until the time of the decedent's death; (b) The decedent was not married at the time the property was first transferred into the trust; and (c) The property was a non-marital asset within the meaning of §61.075, F.S. at the time of the decedent's death.

(k) Exempt property. [§732.2105, F.S.] This category excludes from the elective estate exempt property as defined in §732.402, F.S. because the surviving spouse is entitled to receive these assets in addition to the elective share. Exempt property includes: up to \$20,000 of household furniture, furnishings, and appliances in the decedent's home; two motor vehicles as defined in §316.003(21), F.S.; all qualified tuition programs under IRC §529; and all benefits paid under §112.1915, F.S. (Teachers and school administrators; death benefits). See, §732.402(7), F.S.

(l) Family allowance. [§732.2105, F.S.] This category excludes from the elective estate a family allowance as defined in §732.403, F.S. because the surviving spouse is entitled to receive a family allowance not to exceed \$18,000.00 in addition to the elective share.

(m) Claims. [§732.2055(6)(a), F.S.] This category excludes from the elective estate claims paid or payable from the elective estate.

(n) Mortgages, liens or security interest. [§732.2055(1)(b), F.S.] This category excludes from the elective estate mortgages, liens or security interest on property in the elective estate.

Comment: If you have included any of these categories in the elective estate amount, you will need to deduct them from the elective estate before you determine the elective share amount [elective estate x 30% = elective share]

IV. SATISFACTION

Once the amount of the elective share is determined⁸, that amount may be "satisfied" if the value of the assets the surviving spouse received from the decedent or will receive from the decedent on death exceed the value of the elective share. §732.2075(1)(a), F.S. (1) Unless otherwise provided in the decedent's will or, in the absence of a provision in the decedent's will, in a trust referred to in the decedent's will, the following six categories of property pass to or for benefit of the surviving spouse and are applied first to "satisfy", in whole or in part, the value of the elective share.⁹

I. PROPERTY PASSING TO OR FOR BENEFIT OF THE SURVIVING SPOUSE:

(a) Contingent interests. [§732.2075(1)(a), F.S.] This category includes property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse, including interests that are contingent upon making the election, but only to the extent that such contingent interests do not diminish other property interests that would be applied to satisfy the elective share in the absence of the contingent interests.

Comment: What is an interest contingent upon making the election? In 2002, the law was modified to clarify that interests satisfying the elective share may be provided for on a conditional basis in the decedent's will or other estate planning instrument. Therefore, a trust that is only created or funded in the event the elective share is claimed after death by a surviving spouse is a permissible form of elective share trust.

(b) Retirement plan or similar arrangement. [§732.2075(1)(b), F.S.] To the extent they are payable to or for the benefit of the surviving spouse, this category includes amounts payable under any qualified or unqualified retirement plan or similar arrangement described in §732.2035(8), F.S. Exceptions: Benefits received under social security or the Railroad Retirement Act.

(c) Community property. [§732.2075(1)(c), F.S.] To the extent payable to or for the benefit of the surviving spouse, this category includes the decedent's one-half of any community property described in §732.2045(1)(f), F.S.

(d) Life insurance. [§732.2075(1)(d), F.S.] To the extent paid to or for the benefit of the surviving spouse, the proceeds of any term or other policy of insurance on the decedent's life if, at the time of decedent's death, the policy was owned by any person other than the surviving spouse.

(e) Qualifying special needs trust. [§732.2075(1)(e), F.S.] This category includes property held for the benefit of the surviving spouse in a qualifying special needs trust as defined in §732.2025(8), F.S.

(f) Spousal disclaimer. [§732.2075(1)(f), F.S.] This category includes property interests that would have been applied in satisfaction of the elective share but for the fact that the spouse disclaimed them.

II. VALUATION:

Exclusive of the spouse's interest in a trust, property passing outright to the spouse is valued at its fair market value on the date the spouse takes possession of the property, or, in the case of property passing by right of survivorship, the date of the decedent's death. §732.2095(1)(a) and (2), F.S. If the spouse is entitled only to the use or possession of the property for life, (i.e., a life estate) the spouse's life interest is valued at one-half of the value of the underlying property. §732.2095(2)(a), F.S.

Homestead. If the surviving spouse elects to take an undivided one-half interest in protected homestead as a tenant in common as provided in s. 732.401(2), the value of the spouse's interest is one-half of the value of the property on the applicable valuation date. If the surviving spouse validly waived his or her homestead rights as provided in s. 732.702 or otherwise under applicable

law but nevertheless receives an interest in protected homestead, other than an interest described in s. 732.401, including, without limitation, an interest in trust, the value of the spouse's interest is determined as property interests that are not protected homestead.

Qualifying special needs trust. The value of the spouse's interest is the value of the principal of the trust, or trust portion, on the date of the decedent's death. §732.2095(2)(c), F.S.

Elective share trust. The value of the spouse's interest is a percentage of the value of the principal of the trust, or trust portion, on the applicable valuation date as follows: (1) 100% if the trust instrument includes both a qualifying invasion power **10** and a qualifying power of appointment; **11** (2) 80% if the trust instrument includes a qualifying invasion power but no qualifying power of appointment; (3) 50% in all other cases. §732.2095(2)(b), F.S.

Other trusts. If the surviving spouse has an interest in a trust that does not meet the requirements of either an elective share trust or a qualifying special needs trust (for example, a trust where the spouse is entitled to income or an annuity for a term period), the value of the spouse's interest is the transfer tax value **12** of the interest on the applicable valuation date; however, the aggregate value of all of the spouse's interests in the trust will not exceed one-half of the value of the trust principal on the applicable valuation date. §732.2095(2)(d), F.S.

V. APPORTIONMENT

If, after the application of §732.2075(1), F.S. the elective share is not fully satisfied, the unsatisfied balance shall be allocated entirely to one class of "direct recipients"**13** of the remaining elective estate and apportioned among those recipients, and if the elective share amount is not fully satisfied, to the next class of direct recipients, in the following order of priority, until the elective share amount is satisfied:

- (a) Class 1. - The decedent's probate estate and revocable trusts.
- (b) Class 2. - Recipients of property interests, other than protected charitable interests, included in the elective estate under §732.2035(3), (4), or (7) [co-ownership, POD, beneficiary designations, decedent's fractional interests, life insurance, etc.] and, to the extent the decedent had at the time of death the power to designate the recipient of the property, property interests, other than protected charitable interests, included under §732.2035(6) and (8). Exception: protected charitable interests.**14**
- (c) Class 3. - Recipients of all other property interests, other than protected charitable interests, included in the elective estate.

If the assets in the above classes are insufficient to satisfy the remaining elective share amount, the remaining unsatisfied balance is satisfied from the property held in a trust in which a spouse has an interest but which does not qualify as an elective share trust or a special needs trust. §732.2075(3)(a), F.S. The spouse's interest in any remaining assets in the nonqualifying trusts must be adjusted to reflect the loss in value. §732.2075(3)(b), F.S. If there is more than one nonqualifying trust, the unsatisfied balance must be apportioned pro rata to all such trusts in proportion to the value of the surviving spouse's beneficial interests in the trusts, unless the decedent's will provides otherwise. §732.2075(3)(c), F.S. If the elective share is still not satisfied,

any remaining unsatisfied balance must be satisfied from the direct recipients of protected charitable lead interests as long as the contribution does not disqualify the charitable trust from a deduction under federal gift tax law. §732.2075(4), F.S.

Comment: Within each of the classes described above, each direct recipient (as defined in §732.2025(1), F.S.) is liable in an amount equal to the value of the proportional part of the liability for all members of the class. Therefore, the determination of the direct recipient's proportional liability is a two-step process: first, the contribution amount for the entire class is determined by aggregating the elective estate values of all property interests within the class; and second, the total contribution required from the class is then apportioned among the direct recipients based on the value of their proportionate share of assets within the class. Example: the total value of all property in Class 2 is \$400,000 and the total contribution due from Class 2 is \$100,000 (the unsatisfied elective share amount). Beneficiary A, who is a member of Class 2 by virtue of receiving \$100,000 as a POD beneficiary (1/4 of all property in Class 2), must contribute 1/4 of Class 2 liability towards the elective share, i.e., \$25,000.

VI. CONTRIBUTION

Contribution in Kind. Instead of paying the amount for which they are liable in cash, beneficiaries who have received a distribution of property included in the elective estate and direct recipients may contribute a proportional part of all property received in kind. §732.2075(5), F.S.

Reduction in value of beneficiary's interest prior to contribution. The Elective Share statutes include protection for beneficiaries whose interests have decreased in value since they were valued for elective share purposes. Beneficiaries who have received a distribution of property included in the elective estate and direct recipients other than the decedent's probate estate or revocable trusts whose interest has decreased in value may satisfy his or her contribution liability by (1) contributing all of the property received toward satisfaction of the elective share; or (2) if the property has been sold or exchanged before the date upon which the spouse's election was filed, paying an amount equal to the value of the property on the date it was sold or exchanged, less reasonable costs of sale. §732.2085(2), F.S. If a person pays the value of the property on the date of a sale or exchange or contributes all of the property received, no further contribution is required with respect to the property and any unsatisfied contribution is reapportioned among the other members of the class.

VII. ENFORCEMENT

Under §732.2145(2), F.S., the personal representative has a duty to "collect contribution from the recipients of the elective estate as provided in the court's order of contribution." The personal representative can fulfill this duty by either (1) withholding distributions from estate beneficiaries who are liable for contribution, or (2) collecting contribution from recipients of property that is not in the personal representative's control. If unable to obtain contribution from a third party voluntarily, the personal representative may bring an action to collect contribution. All contributions bear interest at the statutory post-judgment interest rate (§55.03, F.S.) "beginning 90 days after the order of contribution." §732.2145(1), F.S. Interest will be charged on any amount

of the elective share not satisfied within two years of the date of death of the decedent, even if an order of contribution has not yet been entered. §732.2145(1), F.S.

A personal representative may be relieved of the duty of enforcing contribution by an order of the court finding that enforcement is impracticable in light of the improbability of obtaining or collecting on a judgment, or otherwise. §732.2145(3), F.S. The personal representative will “not be liable for failure to attempt collection if the attempt would have been economically impracticable.” Id. A surviving spouse has an independent right to enforce the order of contribution by filing collection proceedings against third parties. §732.2145(4), F.S.

Accrued interest: For decedents dying on or after July 1, 2017, if a person’s required contribution is not fully paid by two years after the date of the death of the decedent, such person must also pay interest at the statutory rate on any portion of the required contribution that remains unpaid. §732.2085(3)(a), F.S. The statutory prejudgment interest rates can be found at: <https://www.myfloridacfo.com/division/aa/local-governments/judgement-interest-rates>.

Judgment in any action brought by the surviving spouse or personal representative to enforce an order of contribution against a third party include the surviving spouse or personal representative’s attorneys’ fees and costs. §732.2145(2)(b) & (4), F.S.

FOOTNOTES:

1 Example - Retained Income for Life. D creates an irrevocable trust, providing for the income to be paid annually to D for life, then for the corpus of the trust to go to X. Subsequently D dies, survived by S and X. Since D retained the right to all of the income, the entire value of the trust is in the elective estate. Had D retained only half of the income, only half of the trust would be included in the elective estate.

Example - Retained Annuity. D creates an irrevocable trust providing for a fixed dollar amount to be paid annually to D for life, after which time the remaining corpus is to go to X. The amount of the annuity payment exceeds the annual income earned on the trust property. D dies six years after the trust is created, survived by S and X. D's retained annuity is treated as a retained right to income. Accordingly, the entire value of the trust (determined as of D's death) is included in the elective estate.

2 Example - Discretionary Trust. D creates an irrevocable trust giving trustee, T, the discretion to distribute income or principal to a group consisting of D and other named members of D's family, with any income not distributed to be added to principal. At the death of the last of D and his children, the trust principal is to be distributed to D's descendants. D dies, survived by S and several children and grandchildren. The entire value of the trust is included in D's elective estate. Had D named S as trustee, nothing would be included.

3 Example - Near Death Assignment. D creates an irrevocable trust, providing for the income to be paid annually to D for life, then for the corpus of the trust to go to X. Two months before his death, D assigns his income interest in the trust to X. D dies, survived by S and X. Had D not

assigned his income interest, the value of the property in this trust would have been included in the elective estate under the rule relating to transfers with a retained right to income.

4 Example - Distribution from Revocable Trust. In January, D creates a revocable inter-vivos trust. In June, D directs the trustee of the trust to pay child, C's \$12,000 college tuition bill. In December and again in January of the following year, D directs the trustee to distribute \$10,000 to C. D dies two months after the final distribution, survived by C and S. Although distributions from a revocable trust are treated as transfers, of the \$32,000 distributed in the year preceding D's death, only \$10,000 is included in the elective estate. The distribution for college tuition and one of the \$10,000 distributions to C are excluded.

5 §732.2155(1) reads: "Sections 732.201-732.2155 are effective on October 1, 1999, for all decedents dying on or after October 1, 2001. The law in effect prior to October 1, 1999, applies to decedents dying before October 1, 2001."

6 Example - Prior Lifetime QTIP. D transfers property worth \$100,000 to an elective share trust prior to October 1 1999, providing for the income to be paid annually to S for life, then for the corpus of the trust to go to X. The trustee has no authority to distribute principal to S. D dies five years later, survived by S and X. At D's death, the property in the trust is worth \$500,000. D's elective estate includes the \$500,000 value of the trust at D's death. S's interest in the trust will satisfy \$250,000 of S's elective share right.

7 The term "Protected homestead" means the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned in tenancy by the entirety or in joint tenancy with rights of survivorship is not protected homestead. See § 731.201(33), F.S.

8 Elective estate x 30% = Elective Share

9 Exception: Unless otherwise provided in the decedent's will or, in the absence of a provision in the decedent's will, in a trust referred to in the decedent's will, the six categories are applied first to satisfy the elective share. §732.2075(1), F.S.

10 The term "Qualifying invasion power" is defined in §732.2095(1)(c), F.S.

11 The term "Qualifying power of appointment" is defined in §732.2095(1)(b), F.S.

12 "Transfer tax value" is defined to be the value the interest would have for gift tax purposes if the interest was assigned to an unrelated person. §732.2025(11), F.S. The reference to "unrelated person" insures that gift tax value will be made without regard to the special valuation rules found in Chapter 14 of the Internal Revenue Code.

13 "Direct recipient" is defined in §732.2025(1), F.S. Comment: The term includes both the decedent's probate estate and the trustee (as opposed to trust beneficiaries) of any property held in trust.

14 “Protected charitable interest” is defined in §732.2075(2), F.S. Comment: The term encompasses outright charitable transfers as well as transfers to charitable remainder or lead trusts, provided in each case, that the transfer qualified for the gift tax (as opposed to the estate tax) charitable deduction at the time it was made.

15 “Protected charitable lead interest” is defined in §732.2075(4), F.S.

16 “Contribution percentage” is defined in §732.2085(1)(b), F.S.

CHAPTER 732 (2022)

PROBATE CODE: INTESTATE SUCCESSION AND WILLS

* * * *

PART II

ELECTIVE SHARE OF SURVIVING SPOUSE; RIGHTS IN COMMUNITY PROPERTY

732.201 Right to elective share.

732.2025 Definitions.

732.2035 Property entering into elective estate.

732.2045 Exclusions and overlapping application.

732.2055 Valuation of the elective estate.

732.2065 Amount of the elective share.

732.2075 Sources from which elective share payable; abatement.

732.2085 Liability of direct recipients and beneficiaries.

732.2095 Valuation of property used to satisfy elective share.

732.2105 Effect of election on other interests.

732.2115 Protection of payors and other third parties.

732.2125 Right of election; by whom exercisable.

732.2135 Time of election; extensions; withdrawal.

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

732.2151 Award of fees and costs in elective share proceedings.

732.2155 Effective date; effect of prior waivers; transition rules.

732.201 Right to elective share.—The surviving spouse of a person who dies domiciled in Florida has the right to a share of the elective estate of the decedent as provided in this part, to be designated the elective share. The election does not reduce what the spouse receives if the election were not made and the spouse is not treated as having predeceased the decedent.

History.—s. 1, ch. 74-106; s. 13, ch. 75-220; s. 1, ch. 99-343; s. 3, ch. 2016-189.

Note.—Created from former s. 731.34.

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

(1) “Direct recipient” means the decedent’s probate estate and any other person who receives property included in the elective estate by transfer from the decedent, including transfers described in s. 732.2035(9), by right of survivorship, or by beneficiary designation under a governing instrument. For this purpose, a beneficiary of an insurance policy on the decedent’s life, the net cash surrender value of which is included in the elective estate, is treated as having received

property included in the elective estate. In the case of property held in trust, “direct recipient” includes the trustee but excludes the beneficiaries of the trust.

(2) “Elective share trust” means a trust under which:

(a) The surviving spouse is entitled for life to the use of the property or to all of the income payable at least as often as annually;

(b) The surviving spouse has the right under the terms of the trust or state law to require the trustee either to make the property productive or to convert it within a reasonable time; and

(c) During the spouse’s life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.

As used in this subsection, the term “income” has the same meaning as that provided in s. 643(b) of the Internal Revenue Code, as amended, and regulations adopted under that section.

(3) “General power of appointment” means a power of appointment under which the holder of the power, whether or not the holder has the capacity to exercise it, has the power to create a present or future interest in the holder, the holder’s estate, or the creditors of either. The term includes a power to consume or invade the principal of a trust, but only if the power is not limited by an ascertainable standard relating to the holder’s health, education, support, or maintenance.

(4) “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.

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

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

(7) “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.

(8) “Qualifying special needs trust” or “supplemental needs trust” means a trust established for an ill or disabled surviving spouse with court approval before or after a decedent’s death, if, commencing on the decedent’s death:

(a) The income and principal are distributable to or for the benefit of the spouse for life in the discretion of one or more trustees less than half of whom are ineligible family trustees. For purposes of this paragraph, ineligible family trustees include the decedent’s grandparents and any descendants of the decedent’s grandparents who are not also descendants of the surviving spouse; and

(b) During the spouse’s life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.

The requirement for court approval shall not apply if the aggregate value of all property in all qualifying special needs trusts for the spouse is less than \$100,000. For purposes of this subsection, value is determined on the “applicable valuation date” as defined in s. 732.2095(1)(a).

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

(10) “Transfer in satisfaction of the elective share” means an irrevocable transfer by the decedent during life to an elective share trust.

(11) “Transfer tax value” means the value the interest would have for purposes of the United States estate and gift tax laws if it passed without consideration to an unrelated person on the applicable valuation date.

History.—s. 2, ch. 99-343; s. 19, ch. 2001-226; s. 2, ch. 2002-82; s. 151, ch. 2004-5; s. 9, ch. 2007-74; s. 3, ch. 2009-115; s. 1, ch. 2017-121.

732.2035 Property entering into elective estate.—Except as provided in s. 732.2045, the elective estate consists of the sum of the values as determined under s. 732.2055 of the following property interests:

(1) The decedent’s probate estate.

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

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

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

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

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

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

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

In the application of this subsection, a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement shall be treated as a right to that portion of the income of the property necessary to equal the annuity, unitrust, or other payment.

(b) The amount included under this subsection is:

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

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

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

1. The property could be distributed to or for the benefit of the decedent only with the consent of all persons having a beneficial interest in the property; or
 2. The income or principal of the property could be distributed to or for the benefit of the decedent only through the exercise or in default of an exercise of a general power of appointment held by any person other than the decedent; or
 3. The income or principal of the property is or could be distributed in satisfaction of the decedent's obligation of support; or
 4. The decedent had a contingent right to receive principal, other than at the discretion of any person, which contingency was beyond the control of the decedent and which had not in fact occurred at the decedent's death.
- (7) The decedent's beneficial interest in the net cash surrender value immediately before death of any policy of insurance on the decedent's life.
- (8) The value of amounts payable to or for the benefit of any person by reason of surviving the decedent under any public or private pension, retirement, or deferred compensation plan, or any similar arrangement, other than benefits payable under the federal Railroad Retirement Act or the federal Social Security System. In the case of a defined contribution plan as defined in s. 414(i) of the Internal Revenue Code of 1986, as amended, this subsection shall not apply to the excess of the proceeds of any insurance policy on the decedent's life over the net cash surrender value of the policy immediately before the decedent's death.
- (9) Property that was transferred during the 1-year period preceding the decedent's death as a result of a transfer by the decedent if the transfer was either of the following types:
- (a) Any property transferred as a result of the termination of a right or interest in, or power over, property that would have been included in the elective estate under subsection (5) or subsection (6) if the right, interest, or power had not terminated until the decedent's death.
 - (b) Any transfer of property to the extent not otherwise included in the elective estate, made to or for the benefit of any person, except:
 1. Any transfer of property for medical or educational expenses to the extent it qualifies for exclusion from the United States gift tax under s. 2503(e) of the Internal Revenue Code, as amended; and
 2. After the application of subparagraph 1., the first annual exclusion amount of property transferred to or for the benefit of each donee during the 1-year period, but only to the extent the transfer qualifies for exclusion from the United States gift tax under s. 2503(b) or (c) of the Internal Revenue Code, as amended. For purposes of this subparagraph, the term "annual exclusion amount" means the amount of one annual exclusion under s. 2503(b) or (c) of the Internal Revenue Code, as amended.
 - (c) Except as provided in paragraph (d), for purposes of this subsection:
 1. A "termination" with respect to a right or interest in property occurs when the decedent transfers or relinquishes the right or interest, and, with respect to a power over property, a termination occurs when the power terminates by exercise, release, lapse, default, or otherwise.
 2. A distribution from a trust the income or principal of which is subject to subsection (5), subsection (6), or subsection (10) shall be treated as a transfer of property by the decedent and not as a termination of a right or interest in, or a power over, property.
 - (d) Notwithstanding anything in paragraph (c) to the contrary:
 1. A "termination" with respect to a right or interest in property does not occur when the right or interest terminates by the terms of the governing instrument unless the termination is determined

by reference to the death of the decedent and the court finds that a principal purpose for the terms of the instrument relating to the termination was avoidance of the elective share.

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

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

History.—s. 15, ch. 75-220; s. 3, ch. 99-343; s. 20, ch. 2001-226; s. 10, ch. 2007-74; s. 2, ch. 2017-121.

Note.—Former s. 732.206.

732.2045 Exclusions and overlapping application.—

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

(a) Except as provided in s. 732.2155(4), any transfer of property by the decedent to the extent the transfer is irrevocable before the effective date of this subsection or after that date but before the date of the decedent's marriage to the surviving spouse.

(b) Any transfer of property by the decedent to the extent the decedent received adequate consideration in money or money's worth for the transfer.

(c) Any transfer of property by the decedent made with the written consent of the decedent's spouse. For this purpose, spousal consent to split-gift treatment under the United States gift tax laws does not constitute written consent to the transfer by the decedent.

(d) The proceeds of any policy of insurance on the decedent's life in excess of the net cash surrender value of the policy whether payable to the decedent's estate, a trust, or in any other manner.

(e) Any policy of insurance on the decedent's life maintained pursuant to a court order.

(f) The decedent's one-half of the property to which ss. 732.216-732.228, or any similar provisions of law of another state, apply and real property that is community property under the laws of the jurisdiction where it is located.

(g) Property held in a qualifying special needs trust on the date of the decedent's death.

(h) Property included in the gross estate of the decedent for federal estate tax purposes solely because the decedent possessed a general power of appointment.

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

(2) OVERLAPPING APPLICATION.—If s. 732.2035(1) and any other subsection of s. 732.2035 apply to the same property interest, the amount included in the elective estate under other subsections is reduced by the amount included under subsection (1). In all other cases, if more than one subsection of s. 732.2035 applies to a property interest, only the subsection resulting in the largest elective estate shall apply.

History.—s. 4, ch. 99-343; s. 21, ch. 2001-226; s. 4, ch. 2009-115; s. 3, ch. 2017-121.

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

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

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

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

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

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

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

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

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

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

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

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

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

History.—s. 5, ch. 99-343; s. 22, ch. 2001-226; s. 4, ch. 2017-121.

732.2065 Amount of the elective share.—The elective share is an amount equal to 30 percent of the elective estate.

History.—s. 15, ch. 75-220; s. 1, ch. 81-27; s. 6, ch. 99-343.

Note.—Former s. 732.207.

732.2075 Sources from which elective share payable; abatement.—

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

(a) Property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse, including interests that are contingent upon making the election, but only to the extent that such contingent interests do not diminish other property interests that would be applied to satisfy the elective share in the absence of the contingent interests.

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

(c) To the extent paid to or for the benefit of the surviving spouse, the decedent's one-half of any property described in s. 732.2045(1)(f).

(d) To the extent paid to or for the benefit of the surviving spouse, the proceeds of any term or other policy of insurance on the decedent's life if, at the time of decedent's death, the policy was owned by any person other than the surviving spouse.

(e) Property held for the benefit of the surviving spouse in a qualifying special needs trust.

(f) Property interests that would have satisfied the elective share under any preceding paragraph of this subsection but were disclaimed.

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

(a) Class 1.—The decedent's probate estate and revocable trusts.

(b) Class 2.—Recipients of property interests, other than protected charitable interests, included in the elective estate under s. 732.2035(3), (4), or (7) and, to the extent the decedent had at the time of death the power to designate the recipient of the property, property interests, other than protected charitable interests, included under s. 732.2035(6) and (8).

(c) Class 3.—Recipients of all other property interests, other than protected charitable interests, included in the elective estate.

For purposes of this subsection, a protected charitable interest is any interest for which a charitable deduction with respect to the transfer of the property was allowed or allowable to the decedent or the decedent's spouse under the United States gift or income tax laws.

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

(a) The remaining unsatisfied balance shall be satisfied from property described in paragraphs (1)(a) and (b) which passes or which has passed in a trust in which the surviving spouse has a beneficial interest, other than an elective share trust or a qualified special needs trust.

(b) In determining the amount of the remaining unsatisfied balance, the effect, if any, of any change caused by the operation of this subsection in the value of the spouse's beneficial interests in property described in paragraphs (1)(a) and (b) shall be taken into account, including, if necessary, further recalculations of the value of those beneficial interests.

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

(4) If, after the application of subsections (1), (2), and (3), the elective share is not fully satisfied, any remaining unsatisfied balance shall be satisfied from direct recipients of protected charitable lead interests, but only to the extent and at such times that contribution is permitted without disqualifying the charitable interest in that property for a deduction under the United States gift tax laws. For purposes of this subsection, a protected charitable lead interest is a protected charitable interest as defined in subsection (2) in which one or more deductible interests in charity precede some other nondeductible interest or interests in the property.

(5) The contribution required of the decedent's probate estate and revocable trusts may be made in cash or in kind. In the application of this subsection, subsections (6) and (7) are to be applied to

charge contribution for the elective share to the beneficiaries of the probate estate and revocable trusts as if all beneficiaries were taking under a common governing instrument.

(6) Unless otherwise provided in the decedent's will or, in the absence of a provision in the decedent's will, in a trust referred to in the decedent's will, any amount to be satisfied from the decedent's probate estate, other than from property passing to an inter vivos trust, shall be paid from the assets of the probate estate in the order prescribed in s. 733.805.

(7) Unless otherwise provided in the trust instrument or, in the decedent's will if there is no provision in the trust instrument, any amount to be satisfied from trust property shall be paid from the assets of the trust in the order provided for claims under s. 736.05053(2) and (3). A direction in the decedent's will is effective only for revocable trusts.

History.—s. 15, ch. 75-220; s. 7, ch. 99-343; s. 23, ch. 2001-226; s. 4, ch. 2002-82; s. 31, ch. 2006-217; s. 11, ch. 2007-74; s. 5, ch. 2009-115; s. 5, ch. 2017-121.

Note.—Former s. 732.209.

732.2085 Liability of direct recipients and beneficiaries.—

(1) Only direct recipients of property included in the elective estate and the beneficiaries of the decedent's probate estate or of any trust that is a direct recipient, are liable to contribute toward satisfaction of the elective share.

(a) Within each of the classes described in s. 732.2075(2)(b) and (c), each direct recipient is liable in an amount equal to the value, as determined under s. 732.2055, of the proportional part of the liability for all members of the class.

(b) Trust and probate estate beneficiaries who receive a distribution of principal after the decedent's death are liable in an amount equal to the value of the principal distributed to them multiplied by the contribution percentage of the distributing trust or estate. For this purpose, "contribution percentage" means the remaining unsatisfied balance of the trust or estate at the time of the distribution divided by the value of the trust or estate as determined under s. 732.2055. "Remaining unsatisfied balance" means the amount of liability initially apportioned to the trust or estate reduced by amounts or property previously contributed by any person in satisfaction of that liability.

(2) In lieu of paying the amount for which they are liable, beneficiaries who have received a distribution of property included in the elective estate and direct recipients other than the decedent's probate estate or revocable trusts, may:

(a) Contribute a proportional part of all property received; or

(b) With respect to any property interest received before the date of the court's order of contribution:

1. Contribute all of the property; or

2. If the property has been sold or exchanged prior to the date on which the spouse's election is filed, pay an amount equal to the value of the property, less reasonable costs of sale, on the date it was sold or exchanged.

In the application of paragraph (a), the "proportional part of all property received" is determined separately for each class of priority under s. 732.2075(2).

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

(a) No further contribution toward satisfaction of the elective share shall be required with respect to that property. However, if a person's required contribution is not fully paid by 2 years after the

date of the death of the decedent, such person must also pay interest at the statutory rate on any portion of the required contribution that remains unpaid.

(b) Any unsatisfied contribution is treated as additional unsatisfied balance and reapportioned to other recipients as provided in s. 732.2075 and this section.

(4) If any part of s. 732.2035 or s. 732.2075 is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the elective estate, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of that item of property or benefit, as provided in ss. 732.2035 and 732.2075, to the person who would have been entitled to it were that section or part of that section not preempted.

History.—s. 8, ch. 99-343; s. 24, ch. 2001-226; s. 6, ch. 2009-115; s. 6, ch. 2017-121.

732.2095 Valuation of property used to satisfy elective share.—

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

(a) “Applicable valuation date” means:

1. In the case of transfers in satisfaction of the elective share, the date of the decedent’s death.

2. In the case of property held in a qualifying special needs trust on the date of the decedent’s death, the date of the decedent’s death.

3. In the case of other property irrevocably transferred to or for the benefit of the surviving spouse during the decedent’s life, the date of the transfer.

4. In the case of property distributed to the surviving spouse by the personal representative, the date of distribution.

5. Except as provided in subparagraphs 1., 2., and 3., in the case of property passing in trust for the surviving spouse, the date or dates the trust is funded in satisfaction of the elective share.

6. In the case of property described in s. 732.2035(2), (3), or (4), the date of the decedent’s death.

7. In the case of proceeds of any policy of insurance payable to the surviving spouse, the date of the decedent’s death.

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

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

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

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

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

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

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

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

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

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

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

3. Fifty percent in all other cases.

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

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

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

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

History.—s. 9, ch. 99-343; s. 25, ch. 2001-226; s. 7, ch. 2017-121.

732.2105 Effect of election on other interests.—The elective share shall be in addition to homestead, exempt property, and allowances as provided in part IV.

History.—s. 15, ch. 75-220; s. 10, ch. 99-343; s. 26, ch. 2001-226.

Note.—Former s. 732.208.

732.2115 Protection of payors and other third parties.—Although a property interest is included in the decedent's elective estate under s. 732.2035(3)-(9), 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.

History.—s. 11, ch. 99-343; s. 8, ch. 2017-121.

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

(1) By the surviving spouse.

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

History.—s. 15, ch. 75-220; s. 12, ch. 99-343; s. 27, ch. 2001-226; s. 6, ch. 2010-132.

Note.—Former s. 732.210.

732.2135 Time of election; extensions; withdrawal.—

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

(2) Within the period provided in subsection (1), or 40 days after the date of termination of any proceeding which affects the amount the spouse is entitled to receive under s. 732.2075(1), whichever is later, but no more than 2 years after the decedent's death, the surviving spouse or an attorney in fact or guardian of the property of the surviving spouse may petition the court for an extension of time for making an election. For good cause shown, the court may extend the time for election. If the court grants the petition for an extension, the election must be filed within the time allowed by the extension.

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

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

History.—s. 15, ch. 75-220; s. 13, ch. 99-343; s. 28, ch. 2001-226; s. 4, ch. 2006-134; s. 7, ch. 2009-115; s. 9, ch. 2017-121.

Note.—Former s. 732.212.

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

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

(2) Except as provided in subsection (3), the personal representative shall collect contribution from the recipients of the elective estate as provided in the court's order of contribution.

(a) If property within the possession or control of the personal representative is distributable to a beneficiary or trustee who is required to contribute in satisfaction of the elective share, the personal representative shall withhold from the distribution the contribution required of the beneficiary or trustee.

(b) If, after the order of contribution, the personal representative brings an action to collect contribution from property not within the personal representative's control, the judgment shall include the personal representative's costs and reasonable attorney's fees. The personal representative is not required to seek collection of any portion of the elective share from property not within the personal representative's control until after the entry of the order of contribution.

(3) A personal representative who has the duty under this section of enforcing contribution may be relieved of that duty by an order of the court finding that it is impracticable to enforce contribution in view of the improbability of obtaining a judgment or the improbability of collection under any judgment that might be obtained, or otherwise. The personal representative shall not be liable for failure to attempt collection if the attempt would have been economically impracticable.

(4) Nothing in this section limits the independent right of the surviving spouse to collect the elective share as provided in the order of contribution, and that right is hereby conferred. If the surviving spouse brings an action to enforce the order, the judgment shall include the surviving spouse's costs and reasonable attorney's fees.

History.—s. 14, ch. 99-343; s. 29, ch. 2001-226; s. 10, ch. 2017-121.

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

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

- (a) The entitlement to or the amount of the elective share;
- (b) The property interests included in the elective estate, or its value; or
- (c) The satisfaction of the elective share.

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

- (a) Direct payment from the estate.
- (b) Direct payment from a party's interest in the elective share or the elective estate.
- (c) Enter a judgment that can be satisfied from other property of the party.

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

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

History.—s. 11, ch. 2017-121.

732.2155 Effective date; effect of prior waivers; transition rules.—

(1) Sections 732.201-732.2155 are effective on October 1, 1999, for all decedents dying on or after October 1, 2001. The law in effect prior to October 1, 1999, applies to decedents dying before October 1, 2001.

(2) Nothing in ss. 732.201-732.2155 modifies or applies to the rights of spouses under chapter 61.

(3) A waiver of elective share rights before the effective date of this section which is otherwise in compliance with the requirements of s. 732.702 is a waiver of all rights under ss. 732.201-732.2145.

(4) Notwithstanding anything in s. 732.2045(1)(a) to the contrary, any trust created by the decedent before the effective date of ss. 732.201-732.2145 that meets the requirements of an elective share trust is treated as if the decedent created the trust after the effective date of these sections and in satisfaction of the elective share.

- (5) Sections 732.201-732.2155 do not affect any interest in contracts entered into for adequate consideration in money or money's worth before October 1, 1999, to the extent that the contract was irrevocable at all times from October 1, 1999, until the date of the decedent's death.
- (6) Sections 732.201-732.2155 do not affect any interest in property held, as of the decedent's death, in a trust, whether revocable or irrevocable, if:
- (a) The property was an asset of the trust at all times between October 1, 1999, and the date of the decedent's death;
 - (b) The decedent was not married to the decedent's surviving spouse when the property was transferred to the trust; and
 - (c) The property was a nonmarital asset as defined in s. 61.075 immediately prior to the decedent's death.
- History.—s. 15, ch. 99-343; s. 30, ch. 2001-226.

Rule 5.360. Elective Share.

- (a) Election.** An election to take the elective share may be filed by the surviving spouse, or on behalf of the surviving spouse by an agent or guardian of the property of the surviving spouse.
- (1) Election by Surviving Spouse. An electing surviving spouse must file the election within the time required by law and promptly serve a copy of the election on the personal representative in the manner provided for service of formal notice.
- (2) Election by Agent or Guardian of the Property of Surviving Spouse.
- (A) Petition for Approval. Before filing the election, the agent or guardian of the property of the surviving spouse must petition the court having jurisdiction of the probate proceeding for approval to make the election. The petition for approval must allege the authority to act on behalf of the surviving spouse and facts supporting the election.
- (B) Notice of Petition. Upon receipt of the petition, the personal representative must promptly serve a copy of the petition by formal notice on all interested persons.
- (C) Order Authorizing Election. If the election is approved, the order must include a finding that the election is in the best interests of the surviving spouse during the spouse's probable lifetime.
- (D) Filing the Election. Upon entry of an order authorizing the filing of an election, the agent or guardian of the property must file the election within the later of the time provided by law or 30 days from service of the order and promptly serve a copy of the election on the personal representative in the manner provided for service of formal notice.
- (b) Procedure for Election.**
- (1) Extension. Within the period provided by law to make the election, the surviving spouse or an agent or guardian of the property of the surviving spouse may petition the court for an extension of time for making an election or for approval to make the election. After notice and hearing the court for good cause shown may extend the time for election. If the court grants the petition for an extension, the election must be filed within the time allowed by the extension.
- (2) Withdrawal of Election. The surviving spouse, an agent, a guardian of the property of the surviving spouse, or the personal representative of the surviving spouse's estate may withdraw the election within the time provided by law.
- (3) Service of Notice. Upon receipt of an election the personal representative must serve a notice of election within 20 days following service of the election, together with a copy of the election, on all interested persons in the manner provided for service of formal notice. The notice of election must indicate the names and addresses of the attorneys for the surviving spouse and the personal representative and must state that:

(A) persons receiving a notice of election may be required to contribute toward the satisfaction of the elective share;

(B) objections to the election must be served within 20 days after service of the copy of the notice of election; and

(C) if no objection to the election is timely served, an order determining the surviving spouse's entitlement to the elective share may be granted without further notice.

(4) **Objection to Election.** Within 20 days after service of the notice of election, an interested person may serve an objection to the election which must state with particularity the grounds on which the objection is based. The objecting party must serve copies of the objection on the surviving spouse and the personal representative. If an objection is served, the personal representative must promptly serve a copy of the objection on all other interested persons who have not previously been served with a copy of the objection.

(c) Determination of Entitlement.

(1) **No Objection Served.** If no objection to the election is timely served, the court must enter an order determining the spouse's entitlement to the elective share.

(2) **Objection Served.** If an objection to the election is timely served, the court must determine the surviving spouse's entitlement to the elective share after notice and hearing.

(d) Procedure to Determine Amount of Elective Share and Contribution.

(1) **Petition by Personal Representative.** After entry of the order determining the surviving spouse's entitlement to the elective share, the personal representative must file and serve a petition to determine the amount of the elective share. The petition must:

(A) give the name and address of each direct recipient known to the personal representative;

(B) describe the proposed distribution of assets to satisfy the elective share, and the time and manner of distribution; and

(C) identify those direct recipients, if any, from whom a specified contribution will be required and state the amount of contribution sought from each.

(2) **Service of Inventory.** The inventory of the elective estate required by rule 5.340, together with the petition, must be served within 60 days after entry of the order determining entitlement to the elective share on all interested persons in the manner provided for service of formal notice.

(3) **Petition by Spouse.** If the personal representative does not file the petition to determine the amount of the elective share within 90 days from rendition of the order of entitlement, the electing spouse or the agent or the guardian of the property or personal representative of the electing spouse may file the petition specifying as particularly as is known the value of the elective share.

(4) **Objection to Amount of Elective Share.** Within 20 days after service of the petition to determine the amount of the elective share, an interested person may serve an objection to the amount of or distribution of assets to satisfy the elective share. The objection must state with particularity the grounds on which the objection is based. The objecting party must serve copies of the objection on the surviving spouse and the personal representative. If an objection is served, the personal representative must promptly serve a copy of the objection on all interested persons who have not previously been served.

(5) **Determination of Amount of Elective Share and Contribution.**

(A) **No Objection Served.** If no objection is timely served to the petition to determine the amount of the elective share, the court must enter an order on the petition.

(B) **Objection Served.** If an objection is timely served to the petition to determine the amount of the elective share, the court must determine the amount of the elective share and contribution after notice and hearing.

- (6) Order Determining Amount of Elective Share and Contribution. The order must:
- (A) set forth the amount of the elective share;
 - (B) identify the assets to be distributed to the surviving spouse in satisfaction of the elective share; and
 - (C) if contribution is necessary, specify the amount of contribution for which each direct recipient is liable.
- (e) Relief from Duty to Enforce Contribution.** A petition to relieve the personal representative from the duty to enforce contribution must state the grounds on which it is based and notice must be served on interested persons.

History

Amended eff. Jan. 1, 1989 (531 So.2d 1261); Oct. 11, 2001 (807 So.2d 622) (816 So.2d 1095); Jan 1, 2006 (912 So.2d 1178); Dec. 9, 2010 (2010 Fla. Lexis 2082); Jan. 1, 2011 (2010 Fla. Lexis 1455); amended eff. Sept. 1, 2012 (102 So. 3d 505) (SC10-2101); amended December 19, 2019, effective January 1, 2020 (287 So. 3d 492) (SC19-164).; amended eff. Oct. 28, 2021 (2021 Fla. LEXIS 1747) (SC21-1049)

ATTORNEY'S FEES

§732.2145(4), F.S.: “Nothing in this section limits the independent right of the surviving spouse to collect the elective share as provided in the order of contribution, and that right is hereby conferred. If the surviving spouse brings an action to enforce the order, the judgment shall include the surviving spouse’s costs and reasonable attorney’s fees.”

§732.2151, F.S. Award of fees and costs in elective share proceedings.—

- (1) The court may award taxable costs as in chancery actions, including attorney fees, in any proceeding under this part in which there is an objection to or dispute over:
 - (a) The entitlement to or the amount of the elective share;
 - (b) The property interests included in the elective estate, or its value; or
 - (c) The satisfaction of the elective share.
- (2) When awarding taxable costs or attorney fees, the court may do one or more of the following:
 - (a) Direct payment from the estate.
 - (b) Direct payment from a party’s interest in the elective share or the elective estate.
 - (c) Enter a judgment that can be satisfied from other property of the party.
- (3) In addition to any of the fees that may be awarded under subsections (1) and (2), if the personal representative does not file a petition to determine the amount of the elective share as required by the Florida Probate Rules, the electing spouse or the attorney in fact, guardian of the property, or personal representative of the electing spouse may be awarded from the estate reasonable costs, including attorney fees, incurred in connection with the preparation and filing of the petition.