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The Florida Probate Code

ROSEMARIE SANDERSON* AND ANDREA SIMONTON**

After tracing the gradual development of the Florida Probate Code, the authors examine the recent case law under the code and identify the statutory provisions in need of further amendment.

I. INTRODUCTION

In 1974, the Florida Legislature enacted a new probate code (hereinafter referred to as “1974 FPC”).1 The former probate laws

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(hereinafter referred to as "1973 probate laws")\textsuperscript{2} were extensively changed by this enactment. These changes were examined in depth in an article by Professors Fenn and Koren.\textsuperscript{3} That article also criticized many of the provisions enacted in 1974 and made recommendations for their amendment.\textsuperscript{4} As a result, the 1975 Florida Legislature significantly revised the 1974 FPC.\textsuperscript{5}

This article will analyze the extensive amendments enacted by the 1975 legislature. It also includes an analysis of the additional amendments enacted by the 1976\textsuperscript{6} and 1977\textsuperscript{7} Florida Legislatures, and the cases construing the FPC.\textsuperscript{8} In certain situations, a comparison has been made between the FPC and the Uniform Probate Code (hereinafter referred to as "UPC"). The FPC was modeled in part after the UPC, and the comparisons illustrate the problems caused by the piecemeal adoption process utilized by the Florida Legislature.

To facilitate the use of this article by the practitioner, it has been arranged sequentially to correspond with the statutory scheme of the FPC. Thus, it begins with a discussion of chapter 731\textsuperscript{9} and concludes with chapter 735\textsuperscript{10} of the FPC.

II. General Provisions

Chapter 731 of the FPC is entitled "General Provisions" and contains provisions applicable to all probate proceedings.\textsuperscript{11} From the time of their original enactment in 1974 to the present, these provisions have been substantially amended by the legislature. This portion of the survey will examine the new developments by discussing each part of chapter 731 separately.

A. Title, Construction and General Provisions

Section 731.011 of the Florida Statutes is the effective date provision of the FPC. Under the 1974 version, the FPC became effective on July 1, 1975.\textsuperscript{12} Intense criticism of the statutory scheme

\begin{itemize}
    \item \textsuperscript{2} Fla. Stat. §§ 731.01-736.31 (1973).
    \item \textsuperscript{4} Id.
    \item \textsuperscript{5} 1975 Fla. Laws, ch. 75-220.
    \item \textsuperscript{6} 1976 Fla. Laws, ch. 76-172.
    \item \textsuperscript{7} 1977 Fla. Laws, chs. 77-87, -104, -172, -174.
    \item \textsuperscript{8} The cases included within this article were decided during the period of time between January 1, 1976, and December 1, 1977.
    \item \textsuperscript{9} Fla. Stat. §§ 731.005-.303 (1977).
    \item \textsuperscript{10} Id. §§ 735.101-.302.
    \item \textsuperscript{11} Id. §§ 731.005-.303.
\end{itemize}
by commentators prompted the legislature to substantially revise the FPC prior to the July 1st effective date. The revised FPC became effective on January 1, 1976 and is applied in determining all substantive rights vesting after that date.

The statutory reliance on notions of vesting for operation of the effective date provision has proven problematical. In Tenopir v. Boles Estate, the decedent died in 1973, prior to the enactment of the FPC. The plaintiff, an illegitimate child of the decedent, petitioned for a determination of heirs in 1975. A summary judgment was entered against the plaintiff in February 1976 based on the 1973 probate laws. The District Court of Appeal, First District, reversed, holding that the 1976 FPC applied. The court reasoned that the plaintiff's heirship rights could vest only when the trial court made its determination of parentage and heirs in 1976. Consequently, the vesting of substantive rights after the FPC's effective date mandated use of the 1976 FPC for determination of the plaintiff's legitimacy status. Under this decision, therefore, the rights of potential heirs are contingent until a petition for determination of heirs is adjudicated. This adjudication must be based on the 1976 FPC if made after January 1, 1976. The date of the decedent's death is irrelevant.

The comparable UPC provision likewise disregards the decedent's date of death as controlling the applicable law; the UPC, however, applies this rule without relying on notions of vesting. It gives the trial judge some discretion in applying UPC provisions where the result would be unjust or unfeasible. The result reached in Tenopir appears inequitable as it allows the vicissitudes of court calendars to determine the moment of vesting. A more appropriate result would have been reached had the court held that all heirship rights vest immediately upon the decedent's death. A subsequent judicial determination of heirs or of one claimant's legal relationship to the decedent would not change the moment of vesting, but would

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13. See Fenn & Koren, supra note 3.
15. 343 So. 2d 130 (Fla. 1st Dist. 1977). The plaintiff, an illegitimate child of the decedent, would not have qualified as a legitimated child under the 1973 probate laws, thereby preventing him from taking an intestate share in the estate. See Fla. Stat. § 731.29 (1973) (repealed 1974). Under both the 1974 and 1975 versions of the FPC, the plaintiff qualified as legitimated child and could take as an heir. For a discussion of children born out of wedlock, see text accompanying notes 60-67 infra.
17. Strong support for this construction is the legislative enactment of Fla. Stat. § 732.101(2) (1977), which expressly states that the moment of vesting of heirship rights is the moment of the decedent's death. For further discussion of this point, see text accompanying note 53 infra.
establish the identity of persons whose rights had previously vested. Obviously, the particular problem encountered in Tenopir is much less likely to recur. However, questions of "vesting" of other "substantive" rights will inevitably arise in the future. To avoid problems analogous to those in Tenopir, the legislature should consider either redrafting section 731.011 to incorporate some of the UPC provisions, or defining the terms used in the section.

B. Definitions

Section 731.201 of the Florida Statutes (1977) contains definitions applicable to the entire FPC. In its 1975 revision, the legislature made several extremely important additions and changes. Essential definitions of the terms "authenticated," "domicile" and "residence" were added, and the definition of the term "beneficiary" was significantly restructured. The 1974 FPC broadly defined the word as "heirs at law and devisees who have a present interest in the estate of a decedent, trust, or other fiduciary relationship." In what may have been merely an attempt to clarify this definition, the 1975 legislature considerably narrowed it to provide that "'[b]eneficiary' means heir-at-law in an intestate estate; devisee in a testate estate; and the owner of a beneficial interest in a trust." Under this definition, "beneficiaries" of a testate estate are only those actually named in the will. Thus, the right of a decedent's heirs at law to challenge a will in which they are not devisees will be significantly affected by the definitional change. This situation is discussed elsewhere in the survey.

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19. Fla. Stat. § 731.201 (1977) defines these terms as follows:
   (1) "Authenticated," when referring to copies of documents or judicial proceedings required to be filed with the court under this code, shall mean a certified copy or a copy authenticated according to s. 1733 or s. 1741, Title 28, U.S.C.
   . . . .
   (11) "Domicile" shall be a person's usual place of dwelling and shall be synonymous with "residence."
   . . . .
   (29) "Residence" means a person's usual place of dwelling and shall be synonymous with "domicile."
   The definition continues with the sentence: "The term does not apply to an heir-at-law, devisee or owner of a beneficial interest in a trust after his interest in the estate of trust has been satisfied."
22. Operation of the new definition precludes such persons from challenging the validity or construction of the will. If such person is a spouse or child of the decedent, he may qualify under the pretermitted spouse or child provisions to recover part of the estate. See Fla. Stat. §§ 732.301 & .302 (1977), and text accompanying notes 77-79 infra.
23. See text accompanying notes 185-90 infra.
In conjunction with the change in the "beneficiary" definition, definitions of the terms "heirs" and "heir-at-law" were added. The legislature also added definitions of "child" and "parent." These new terms considerably clarify the application of provisions relating to adopted persons, persons born out of wedlock, pretermitted children, homestead, exempt property and the family allowance.

In 1975, a broad definition of "interested person" was substituted for the prior categorization of persons qualifying under this term. An "interested person" is now defined, in part, as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding." This fluid standard is highly desirable since many persons actually affected by probate proceedings had been omitted from the former version's specific categories; for example, the trustee of a trust subject to a devise. There is, however, a narrowing aspect to this flexible standard. Under the 1974 FPC, a strong argument could be made that persons falling within the specific categories listed were interested persons in all proceedings, whether or not "reasonably expected to be affected by the outcome." The last sentence of the definition, which seemed to counter this argument, could be construed to apply solely to persons who did not fall within a listed category. Thus, by deleting the

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24. 1975 Fla. Laws, ch. 75-220, § 4 (current version at Fla. Stat. § 731.201 (1977)). The definition provides: "'(18) 'Heirs' or 'heirs-at-law' means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to property of a decedent.'"

25. Fla. Stat. § 731.201 (1977) provides:
   (3) "Child" includes a person entitled to take as a child under this code by intestate succession from the parent whose relationship is involved, and excludes any person who is only a stepchild, a foster child, a grandchild, or a more remote descendant.
   (24) "Parent" excludes any person who is only a stepparent, foster parent, or grandparent.

26. Id. § 732.108 (adopted persons and persons born out of wedlock); Id. § 732.302 (pretermitted children); Id. § 732.401-.403 (homestead, exempt property and family allowance).

27. Fla. Stat. § 731.201(17) (Supp. 1974) originally listed the following as interested persons:

heirs, devisees, the spouse, creditors, beneficiaries, sureties on a personal representative's bond, and any other person having a property right in, or claim against, a trust estate or the estate of the decedent that may be affected by the proceedings [and] . . . persons having priority for appointment as personal representative and other fiduciaries representing interested persons.

28. Fla. Stat. § 731.201(21) (1977), which provides further that:

In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative of the estate shall be deemed to be an interested person. The term does not include an heir at law or a devisee who has received his distribution. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.
specific categories entirely, the 1975 legislature may have narrowed the class of interested persons to only those expected to be affected by the outcome of a particular proceeding. The effect of this new definition on other sections of the FPC is the focus of discussion elsewhere in this survey.\textsuperscript{29}

The definition of the term "claims" was amended by the 1975 legislature to exclude from its scope the liabilities of the estate which arise at or after the decedent’s death, as well as administration expenses and succession or death taxes.\textsuperscript{30} These changes clarify application of the provision requiring filing before the estate takes a deduction for a claim,\textsuperscript{31} and the provision pertaining to computation of a surviving spouse’s elective share.\textsuperscript{32} Despite these beneficial amendments, the legislature has yet to follow the commentators’ recommendation to expressly exclude funeral expenses from this definition.\textsuperscript{33}

C. Notice and Virtual Representation

Prior to the 1977 legislative session, there were two separate statutes providing for waiver. One allowed waiver of rights by an interested party,\textsuperscript{34} and the other allowed waiver of notice by any person entitled to it.\textsuperscript{35} These have been consolidated into one provision, section 731.302 of the Florida Statutes, which is a comprehensive attempt to cover the parties entitled to waiver as well as the matters subject to waiver.\textsuperscript{36}

There are two potential problems with the new waiver provision. First, it does not specifically allow for waiver of the filing of documents as did the prior statute.\textsuperscript{37} Arguably, the filing of documents is a “right or notice” encompassed within the broad language of the new provision.\textsuperscript{38} It is also arguable, however, that the omission

\begin{itemize}
  \item 29. See text accompanying notes 185-90 infra.
  \item 30. 1975 Fla. Laws, ch. 75-220, § 4 (current version at Fla. Stat. § 731.201(4) (1977)).
  \item 31. See Fla. Stat. § 733.702 (1977) and text accompanying note 264 infra.
  \item 32. See Id. § 732.207 and text accompanying notes 71-72 infra.
  \item 33. See Fenn & Koren, supra note 3, at 662.
  \item 35. Id. § 731.302 (amended 1977).
  \item 36. Fla. Stat. § 731.302 (1977) provides:
    \begin{quote}
    Unless this code specifically provides otherwise, an interested person, including a guardian ad litem, administrator ad litem, guardian of the property, personal representative, trustee, or other fiduciary, or a sole holder of all coholders of a power of revocation or a power of appointment, may waive any right or notice, and consent to any action or proceeding which may be required or permitted by this code.
    \end{quote}
  \item 38. See note 36 supra.
\end{itemize}
evidences a legislative intent to revoke the right to waive filing. This would be a regrettable loss, especially in the administration of small family estates. The second potential problem is of greater significance. The new provision does not require the waiver to be made in writing as did the prior statute.\textsuperscript{39} This omission can only result in increased litigation over the establishment of alleged waivers. A written waiver is not an unreasonable or burdensome requirement when compared to the potential for abuse inherent in the new section. Thus, although the scope of the consolidated provision is highly desirable to facilitate administration and probate, the legislature should consider imposing a writing requirement for its use.\textsuperscript{40}

Section 731.110 of the Florida Statutes, pertaining to the filing of caveats to prevent administration without the caveator’s knowledge, was considerably broadened by the 1977 legislature. Under the 1975 FPC, the procedure was limited to state agencies who were creditors of the estate.\textsuperscript{41} It is now available to any person who is wary of disposition of an estate without his knowledge.\textsuperscript{42} This change is commendable. The legislature has transformed the caveat into an efficient and simple protective device for a decedent’s creditors and others having a stake in the administration of the estate. The 1977 legislature also deleted from section 731.110, and transferred to the Rules of Probate and Guardianship Procedure, the statutory requirement of notice to the caveator before a will is probated or before a personal representative is discharged.\textsuperscript{43}

Section 731.303 of the Florida Statutes, entitled “Representation,” codified several exceptions to the doctrine that all persons whose property rights are affected by a particular proceeding are

\textsuperscript{39} FLA. STAT. § 731.108 (1975)(repealed 1977).
\textsuperscript{40} Cf. UNIFORM PROBATE CODE § 1-402 (allowing waiver of notice by a writing signed by the party or his attorney and filed in court).
\textsuperscript{41} FLA. STAT. § 731.110 (1975)(amended 1977). The operation of this section also extended to “any beneficiary who was apprehensive that a will might be admitted to probate without its knowledge.”
\textsuperscript{42} FLA. STAT. § 731.110 (1977) provides:
   (1) If any creditor of the estate of a decedent is apprehensive that an estate, either testate or intestate, will be administered without his knowledge, or if any person other than a creditor is apprehensive that an estate may be administered, or that a will may be admitted to probate, without his knowledge, he may file a caveat with the court.
   (2) No caveat shall be effective unless it contains a statement of the interest of the caveator in the estate, the name and specific residence address of the caveator, and, if the caveator, other than a state agency, is a nonresident of the county, the additional name and specific residence address of some person residing in the county, designated as the agent of the caveator, upon whom service may be made.
necessary parties to the proceeding. The 1974 version of this provision mandated that an unborn person was bound by orders affecting another party to the extent the unborn's interest was represented by the other party having the same interest. This was amended in 1975 to allow the ascertained party's interest to be of the "same or greater quality" as the unborn person's interest. This change allays the commentators' fears that the provision was unduly restrictive and would increase the cost of probate.

In conjunction with broadening the class of eligible representatives of unborn persons, the 1977 legislature revoked the requirement that separate statutory notice for the unborn be given to such representatives. Apparently, the legislature believed that the requirement was redundant by demanding two notices to the same party. Now, the required notice to the representative will presumably serve as constructive notice to the unborn person.

The 1977 legislature amended another subsection of section 731.303, which had previously provided: (2) Persons are bound by orders binding others in the following cases: (a) Orders binding the sole holder or all coholders of a power of revocation or a presently exercisable power of appointment . . . bind other persons to the extent that their interests . . . are subject to the power. In 1977, the words "presently exercisable power" were replaced by the words "general power." At first glance, the amendment appears merely to narrow the application of the section by removing the possibility that orders on holders of special powers would bind subjects of the power; the rewording, however, concomitantly broadens the common law doctrine codified in this section. At common law, subjects

44. Fla. Stat. § 731.303 (1977). It should be noted that although Fla. Stat. § 731.303 (1975) was entitled "Virtual Representation," its provisions actually encompassed more than the narrow common law doctrine. That doctrine provides that unborn or unascertained persons are bound by orders affecting those whose property interests are of equal or greater quantity than those of the unborn. The other provisions in this statute defined the extent to which subjects of a power are bound by orders affecting holders of the powers, and the binding of wards, trust beneficiaries, and estate beneficiaries through orders affecting their fiduciaries.


The following example clarifies this doctrine. The holder of a tenancy for years or for life can never represent a remainderman's interest because the tenant's interests are not of equal or greater quality than those of the remainderman. On the other hand, a life tenant can represent the holder of a tenancy for years because the life tenant's interests are of greater quality than the interests of the tenant for years.

47. Fenn & Koren, supra note 3, at 624.


of only presently exercisable general powers of appointment could be bound by orders affecting holders of the power. The rationale for this was that since the holder was also a potential subject of the power, his interest in a proceeding was of the same quality as that of the other subjects. The 1977 amendment expands the application of the doctrine to subjects of general testamentary powers as well. The holder of such a power does not appear to hold a quality of interest equal to that held by the subjects, even though he may appoint to his estate. If this expansion of the common law doctrine was not the legislative intent, the section should be amended again to read “presently exercisable general power.”

III. INTESTATE SUCCESSION AND WILLS

Chapter 732 of the FPC pertains to the intestate distribution of property and the requirements for and operation of testate estates. The following portion of the survey examines the statutory changes made since the 1974 FPC and the case law arising under this chapter since January of 1976.

A. Intestate Succession

Section 732.101 of the Florida Statutes defines an intestate estate. In a 1975 amendment to this section, the legislature established that an heir’s right to intestate property vests at the moment of the decedent’s death. The holding in Tenopir v. Boles Estate is clearly contrary to this rule. The Tenopir court held that the rights of an alleged heir are contingent until a judicial determination of heirs is made, at which time the heirship rights vest in those persons adjudicated “heirs” of the decedent.

Prior to 1977, section 732.106 of the Florida Statutes limited the class of afterborn persons eligible to inherit from the decedent by intestacy to afterborn “issue” of the decedent. This was recently changed to afterborn “heirs,” and now more nearly conforms to the UPC provision. The effect of this amendment is to enable after-

52. See Phipps v. Palm Beach Trust Co., 196 So. 299 (Fla. 1940); In re Estate of Wylie, 342 So. 2d 996 (Fla. 4th Dist. 1977).
53. 1975 Fla. Laws, ch. 75-220, § 8 (current version at FLA. STAT. § 732.101(2) (1977)). There is no comparable provision in the UPC.
54. 342 So. 2d 130 (Fla. 1st Dist. 1977). This case is discussed in greater detail in the text accompanying note 15 supra.
56. 1977 Fla. Laws, ch. 77-37 § 6 (codified at FLA. STAT. § 732.106 (1977)).
born collateral relatives as well as lineal descendants to take through intestacy. As noted by the commentators, proving the eligibility of an afterborn is relatively simple with per stirpes distribution and intestate shares limited to descendants of the decedent's aunts and uncles. The only necessary elements of proof are: (1) that the alleged heir was born within nine months of his father's death; and (2) that the father of the alleged heir predeceased the decedent.

The section 732.108 provision for intestate inheritance rights of persons born out of wedlock is a fertile source of litigation in Florida. The 1974 version of this provision was substantially reworded without substantive change by the 1975 legislature. An important amendment was made by the 1977 legislature when it added written acknowledgment by the father as the third alternative method for establishing paternity under the statute. This alternative was embodied in prior Florida probate law, but does not appear in the UPC.

Recent case law has recognized that an insurance application signed by the decedent, in which he lists the child as his own, is sufficient written acknowledgment to entitle the child to an intestate share. Florida courts now permit a woman to testify that a

58. Fenn & Koren, supra note 3, at 44.
59. The FPC restricts intestate taking in both of these ways. See Fla. Stat. § 732.104, .103(4)(b) (1977). Under the per stirpes rule, the estate is equally divided among all relatives holding an equally close degree of kinship to the decedent (not to exceed the degree of the decedent's second cousins). Thus, a child of an heir can take only if his parent dies before the decedent. In that case, he takes a share of his parent's share. If there are no living relatives of a degree equal to that of his deceased parent, he takes equally with heirs sharing his degree of kinship to the decedent.
62. 1977 Fla. Laws, ch. 77-87, § 7 ch. 77-174, § 1. The pertinent section now provides:
   (2) . . . . The person is also a lineal descendant of his father and is one of the natural kindred of all members of the father's family, if:
   (a) the natural parents participated in a marriage ceremony before or after the birth of the person born out of wedlock, even though the attempted marriage is void.
   (b) The paternity of the father is established by an adjudication before or after the death of the father.
   (c) The paternity of the father is acknowledged in writing by the father.
64. Cf. Uniform Probate Code § 2-109 (requiring the father to support the child and treat him as his own before a paternity adjudication is effective to entitle the father to inherit from the child).
65. Williams v. Estate of Long, 338 So. 2d 563 (Fla. 1st Dist. 1976); In re Estate of Jerrido, 339 So. 2d 237 (Fla. 4th Dist. 1976). Both of these cases were decided under Fla. Stat. § 731.29 (1973), which allowed written acknowledgment analogous to the present provision.
child born in wedlock was fathered by someone other than her husband. Although her testimony alone is not sufficient to establish paternity, it is highly relevant in a proceeding to adjudicate paternity after the alleged father's death. It will therefore be important in future inheritance proceedings under section 732.108. As previously discussed, an adjudication of paternity incident to a determination of heirs made after January 1, 1976 must be made pursuant to the 1976 FPC, even if the decedent died prior to that date.

Under section 732.109 of the Florida Statutes (Supp. 1974), a debt owed to the decedent was not charged to or included in the calculation of the intestate share of any person except the debtor. Under the same section, if the debtor predeceased the decedent, the amount of the debt would not be taken into account in computing the intestate share of the debtor's "issue." The 1975 legislature substituted the word "heirs" for "issue" in recognition of the inequities inherent in the original version. Consequently, the present rule mandates that a debt owed a decedent be subtracted from the intestate share of the debtor if he is alive at the decedent's death. If he does not survive the decedent, the debt is not charged against the intestate shares of the debtor's heirs, who would take per stirpes. This is a preferable result when compared with the prior provision under which heirs of the decedent other than his issue, for example, his spouse, parents, etc., were chargeable with the debt.

B. Elective Share Rules

Chapter 732, part II of the Florida Statutes (1977) governs the elective share of the decedent's surviving spouse. The elective share concept was initially introduced in the 1974 FPC; however, the 1975 legislature made substantial changes in the organization as well as in the content of this part. The following discussion will focus on the substantive amendments and will not attempt to correlate the sections in which specific provisions now appear with the sections in which they formerly appeared.
One of the most important amendments made by the 1975 legislature was a change in the definition of the elective share amount. Under the 1974 FPC, a spouse was entitled to one third of a "net distributable estate," defined as all of the estate's assets minus taxes, claims, family allowance, exempt property, and expenses of administration.\(^1\) This was considerably modified by sections 732.206 and 732.207 of the Florida Statutes (1977). Under these two sections, a spouse is entitled to thirty percent of the fair market value of all the property of the decedent subject to administration in Florida on the date of death, minus all valid claims against the estate or payable from the estate. Although the percentage figure is now smaller than in the 1974 FPC, there is a substantial increase in the base amount under the amended version because of the revised definition of "claims" in section 731.201(4).\(^2\) "Claims" explicitly does not include administration expenses, estate, inheritance, succession or other death taxes. Each of these was expressly deducted from the base amount under the 1974 version. Thus, the legislature significantly increased the attractiveness of the statutory share, especially coupled with the increased marital deduction available under current federal tax laws.\(^3\) Note, however, that if the election of the statutory share results in increased estate, inheritance or death taxes, the spouse must bear the additional tax under section 732.215 of the Florida Statutes (1977). Consequently, although the spouse's share may be larger, he will be charged with any additional estate taxes incurred if he upsets a carefully constructed estate plan by electing the statutory share.

In 1975, the legislature added section 732.209 which defines the assets from which the elective share is payable.\(^4\) The section gives primary recognition to will provisions by providing that the spouse shall receive the assets which would have passed to him under the will, and that property assessed with the elective share may be purchased by its original devisee. Thus, the provision goes far to uphold the testator's testamentary scheme while enabling the surviving spouse to take a share.

With the enactment of section 732.212, the legislature reduced the spouse's time for election of the statutory share from five to four

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72. Fla. Stat. § 731.201(4) (1977); see text accompanying note 30 supra.
73. Under the Tax Reform Act of 1976, I.R.C. § 2056(c), the marital deduction was increased to 50% of the adjusted gross estate or $250,000, whichever is greater. In all probability, spouses choosing the elective share will fall within these ranges, and consequently, qualify for the Fla. Stat. § 733.817 (1975) exemption from contribution to the estate tax for property subject to the marital deduction.
months after the first publication of notice of administration.\textsuperscript{75} If litigation occurs, the time is extended until forty days after the termination of litigation. Distribution of the elective share may be required six months after the date of death or when the federal tax return is filed, whichever occurs later.\textsuperscript{76}

C. Pretermitted Spouse and Children

Sections 732.301 and 732.302 of the Florida Statutes (1977) determine the rights of spouses and children not mentioned in the decedent’s will. For rights to accrue under these sections, the relevant marriage, birth or adoption must have occurred after execution of the will.\textsuperscript{77}

The 1977 legislature clarified and broadened the pretermitted spouse provision. Section 732.301 of the Florida Statutes (1975) was amended to include waiver by the spouse as an alternative to her pretermitted share, and to allow the waiver or other spousal provision to be made in a prenuptial or postnuptial agreement.\textsuperscript{78} These amendments recognize and permit more flexible estate planning outside of the traditional will or marriage contract.\textsuperscript{79}

D. Exempt Property and Allowances

Chapter 732, part IV of the Florida Statutes (1977) sets forth rules pertaining to certain of the decedent’s property which may not be subject to administration if he is survived by a spouse and/or certain lineal descendants. These exceptions are applicable only to property owned by a decedent domiciled in Florida.

Homestead property is governed by section 732.401,\textsuperscript{80} which


\textsuperscript{76} FLA. STAT. § 732.214 (1977).

\textsuperscript{77} This requirement is explicitly set forth in two statutory provisions. See id. §§ 732.301 & 302.

\textsuperscript{78} 1977 Fla. Laws, ch. 77-87, § 9.

\textsuperscript{79} See McAbee v. Edwards, 340 So. 2d 1167 (Fla. 4th Dist. 1976), where the sole beneficiary under a will sued the decedent’s attorney for malpractice after he advised the decedent that her subsequent marriage would have no effect on the will. The decedent’s second husband claimed as a pretermitted spouse and eventually settled with the beneficiary. The court found the attorney liable, reasoning that when an attorney attempts to fulfill the testamentary desires of a client, he assumes a fiduciary relationship with the intended beneficiaries as well.

\textsuperscript{80} FLA. STAT. § 732.401 (1977) provides:

(1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and lineal descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of the decedent’s death.
controls its descent by intestacy, and section 732.4015, which controls its devise by will.

Section 732.401 provides that homestead property, if it is not devised by will, passes to the surviving spouse as a life estate with vested remainder in lineal descendants. This provision is the result of a 1975 amendment giving preference to will devises, a priority which the 1974 FPC had omitted. Section 732.401(2) specifically exempts from its homestead provisions residences owned in the form of a tenancy by the entirety, if there is a surviving spouse.

Section 732.4015 was added to part IV by the 1975 legislature. It is a codification of article X, section 4 of the Constitution of Florida, which prohibits the devise of a homestead if the decedent is survived by a spouse or minor child, except that it may be devised to the spouse if there are no minor children. The express exception for devise to the spouse in the absence of minor children did not appear in the constitution until 1972, although it was recognized by case law prior to that date.

The two homestead statutes have been the subject of significant litigation since 1976. In Estate of Murphy, the Supreme Court of Florida held that a homestead need not be passed by a specific will devise, but rather could be passed by a general residuary clause. The decedent had specifically devised his homestead to his wife for life, remainder to his adult son, and the entire residuary estate to his wife. The decedent later sold this particular homestead and purchased another, but never changed his will. Upon the testator's death, his son challenged the wife's claim to fee simple title of the new homestead under the residuary clause. The son contended that homestead is not part of the probate estate, cannot pass through a residuary clause, and must descend by intestacy. The supreme
court held that the residuary clause was effective to pass all after-acquired property, including homestead. The court recognized that neither the Constitution of Florida nor section 732.4015 of the Florida Statutes (1975) expressly limits the passing of homestead to a specific devise, although this method is more desirable. This broad and well reasoned construction acknowledges the desire of most testators to pass homestead in fee simple to their spouses. More importantly, it recognizes the tendency of homestead owners to change residences more frequently than they change will provisions.

Although it was unnecessary for the court to do so in Murphy, the recent case of In re Estate of Endres construed the retroactive effect of the constitutional amendment allowing a homestead to be devised to a spouse in the absence of minor children. The decedent had executed a will devising his homestead to his wife in fee simple, but died prior to the 1972 amendment. He was survived by his wife and two grandchildren, who would have taken a remainder interest in the property if it descended by intestacy. The District Court of Appeal, Fourth District, held that pursuant to the constitutional provision and probate law in effect at the testator's death, the devise to the spouse was invalid and the homestead was to pass as intestate property. Thus, at the testator's death the grandchildren accrued vested remainder interests in the homestead, subject to the spouse's life estate. Anomalously, the court admitted that this result was directly contrary to an earlier decision by the Supreme Court of Florida, which upheld the devise of a residence to a spouse in the absence of minor children prior to the amendment. Thus the Endres court's decision not only failed to recognize the retroactive effect of the constitutional amendment, but also failed to recognize case law decided by the highest court in the state prior to its decision. This is clearly contrary to our common law form of jurisprudence and should not be followed. The Supreme Court of Florida ultimately reached the same conclusion by vacating the Fourth District's decision.

89. See note 87 supra.
90. 345 So. 2d 793 (Fla. 4th Dist. 1977).
91. FLA. STAT. § 731.27 (1971)(repealed 1974), in effect at the testator's death, was substantially similar to the present statute, FLA. STAT. § 732.401(1) (1977), as set forth in note 80 supra. The constitutional provision in effect at the testator's death provided: 'The homestead shall not be subject to devise if the owner is survived by spouse or minor child . . . .' FLA. CONST. art. X, § 4 (1968).
92. In re Estate of McCartney, 299 So. 2d 5 (Fla. 1974).
93. Endres v. Matthias, 353 So. 2d 843 (Fla.), vacating sub nom. In re Estate of Endres, 345 So. 2d 793 (Fla. 4th Dist. 1977); accord, In re Estate of McCartney, 299 So. 2d 5 (Fla. 1974).
In re Estate of Wartels presented the question whether ownership in a cooperative apartment qualifies as homestead property under the laws of descent and distribution. This was a case of first impression for Florida courts. The Attorney General of Florida had already decided the question in the negative. The basis for his ruling was that ownership of a cooperative apartment is a stock rather than a realty interest, and that the statute allowing such owners a homestead tax exemption was confined to taxation purposes only. The District Court of Appeal, Third District, recognized the importance of this case and certified the question to the Supreme Court of Florida. The supreme court agreed with the Third District, holding that a cooperative apartment is not homestead property for purposes of property descent.

Section 732.402 of the Florida Statutes lists the exempt property, other than homestead, to which a surviving spouse or minor children are entitled upon the death of a Florida domiciliary. In 1975, the legislature amended the provision to include automobiles, as well as household furnishings, furniture and appliances, up to a total value of five thousand dollars. At the same time, the legislature deleted the provision that rights to this property had priority over all unsecured claims. The 1977 legislature recently reinstated the priority of rights in this property over all other estate claims except perfected security interests on specific items of exempt property. The amendment puts all exempt property beyond the reach of unperfected creditors and assessment for funeral debts and administration expenses, in conformity with section 2-402 of the UPC.

The final section of part IV is section 732.403 of the Florida Statutes (1977), which provides for payment of a six thousand dollar maximum family allowance to the surviving spouse and dependent lineal heirs of the decedent. Application of this provision was originally limited to the surviving spouse and minor children whom the decedent was supporting or had an obligation to support. In 1975, the legislature broadened the scope of section 732.403 by changing

94. 388 So. 2d 48 (Fla. 3d Dist. 1976). The spouse was held entitled to dower (one third of decedent's real property), but the decedent's interest in the cooperative apartment was not included in this calculation.

95. (1971) FLA. ATT'Y GEN. ANNUAL REP. 27.


97. In re Estate of Wartels, No. 50,488 (Fla. April 7, 1978). The court held that an owner of a cooperative apartment does not have a proprietary interest in realty which is required for the status of homestead property other than for purposes of taxation.


the words "minor children" to "the decedent's lineal heirs" throughout the provision, and specifically defining "lineal heirs" as lineal ascendants and descendants.\textsuperscript{101} The amendment is important and sound. It recognizes the probability that dependent ascendants of the decedent, such as parents, will require living expenses during the period of administration. Moreover, it acknowledges the modern social trend of children remaining dependent on their parents after reaching the age of majority.

E. Wills

Part V of the FPC governs the making and revocation of testamentary instruments. Section 732.502 of the Florida Statutes (1977) sets forth the requirements for a legally executed will. In its 1974 version, this provision contained a purging clause which operated to invalidate gifts to attesting witnesses unless two other disinterested witnesses signed the document.\textsuperscript{102} In accordance with the UPC, this clause was deleted in 1975 along with a reference to it in section 732.504.\textsuperscript{103} The 1975 legislature amended another portion of section 732.502 to provide that a handwritten will executed in accordance with the FPC would not be considered a holographic will.\textsuperscript{104} This amendment closed a major gap in the statute which otherwise provides that a holographic will by a nonresident of Florida is invalid.\textsuperscript{105}

Commentators on the 1974 FPC feared that the requirements imposed by the self-proving will provision, section 732.503, would be imputed as standards for determining the validity of all wills executed under section 732.502.\textsuperscript{106} In re Estate of Kavcic\textsuperscript{107} confronted this construction of the statutes. The testator had signed a will disposing of personal property in the presence of two attesting witnesses who then signed it in the presence of each other, but not in the presence of the testator. The self-proving will provision requiring witnesses to sign in the testator's presence was in effect, along

\textsuperscript{101} 1975 Fla. Laws, ch. 75-220, § 19 (current version at Fla. Stat. § 732.403 (1977)).
\textsuperscript{103} 1975 Fla. Laws, ch. 75-220, §§ 21 & 22. Prior to the amendment, the courts regularly avoided this rule. E.g., In re Estate of Johnson, 347 So. 2d 785 (Fla. 1st Dist. 1977), where the court upheld a bequest to the testator's maid who had witnessed the will with one other person. The court found that there was no reason to apply the rule because there was no possibility of undue influence by the maid.
\textsuperscript{104} 1975 Fla. Laws, ch. 75-220, § 21.
\textsuperscript{105} Fla. Stat. § 732.502(2) (1975) provides that "[a]ny will, other than a holographic or nuncupative will, executed by a nonresident of Florida . . . is valid as a will in this state if valid under the laws of the state or country where the testator was at the time of execution . . . ."
\textsuperscript{106} Fenn & Koren, supra note 3, at 19.
\textsuperscript{107} 341 So. 2d 278 (Fla. 1st Dist. 1977).
with a pre-FPC statute imposing a similar requirement solely on wills disposing of real property. The District Court of Appeal, First District, held that the self-proof provision did not control in determining the propriety of the will's execution. Rather, the self-proof provision enabled the testator to choose one easy method for authentication if he so desired. The decision is commendable and appears to be consistent with the legislative intent to offer the choice of a higher degree of formality in exchange for ease of authentication. It must be noted, however, that the narrow issue in Kavcic has become moot. The 1975 legislature amended section 732.502(1), the general execution provision, to require the witnesses to sign in each other's presence. The formalities required by section 732.502 are now aligned closely with those required by the self-proof provision, section 732.503. Thus, the fears of the commentators were well founded, although it was not anticipated that the legislature itself would adopt the self-proving will requirements as standards of validity for all wills.

In 1975, the legislature amended section 732.505, which provides for revocation by writing, and section 732.504, which provides for revocation by act, specifically to subject codicils as well as wills to these provisions. Since "will" is defined in section 732.201(34) as including codicils, the amendments are technically unnecessary, but they do provide clarification.

Section 732.507(2) provides that upon dissolution of marriage all will bequests in favor of the divorced spouse are void. Despite this statute, the importance of revising a will after divorce cannot be overemphasized. In Lamontagne v. Hunter, the decedent's will devised his entire estate to his wife, and if she should predecease him, to his stepsons (the wife's children). The decedent divorced his wife, but did not amend the will. Upon his death, the District Court of Appeal, Second District, held that the estate should be divided between the children. The court construed the will to mean that the children were intended to take if the wife was unavailable to do so, and that divorce had an effect analogous to death in removing the spouse from the will. It is questionable whether this result manifests the decedent's intent. Since the court could not create testamentary dispositions from extrapolated intent, however, the decision reached

108. FLA. STAT. § 731.07(2) (1973) (repealed 1974). Thus, if the court found the self-proving requirements necessary, the will lacked the necessary formalities to be effective for probate.
110. Id. § 23.
111. FLA. STAT. § 732.507(2) (1977).
112. 341 So. 2d 1075 (Fla. 2d Dist. 1977).
here reasonably construes the will provisions in light of the testator's inaction.

Section 732.508, entitled "Revival by Revocation," was amended in 1975 to codify the common law doctrine that revocation of a codicil does not revoke the will, but is presumed to reinstate the provisions it originally changed or deleted.113 This codification is merely an extension of prior Florida case law.114

Another common law doctrine statutorily enacted by the 1975 legislature is the doctrine of independent significance, now embodied in section 732.512(2).115 Recognized under prior Florida case law, this doctrine allows the testator some latitude in describing his intended beneficiaries or the property they are to receive.116 As long as the determining events or contingencies have significance apart from their impact on the will, the disposition is presumed not to have been made in avoidance of formal will requirements. The codification of the doctrine of independent significance is commendable. As noted in early criticism of the 1974 FPC,117 the doctrine of independent significance complements the doctrine of incorporation by reference embodied in section 732.512(1) and acts as a restraint on the operation of section 732.515, which is discussed below.

Section 732.515 of the Florida Statutes (1977) is unique to the FPC. The provision expands the incorporation by reference doctrine embodied in section 732.512(1) by suspending the prerequisites of section 732.512(1) for disposition of special classes of property. Under section 732.515, a will is effective to dispose of tangible personal property listed in a separate document executed by the testator either before or after the execution of the will. In the 1974 version, money, evidences of indebtedness, documents of title, securities and property used in a trade or business were excluded from such disposition.118 The 1975 legislature broadened the provision considerably by deleting evidences of indebtedness, documents of title and securities from the exceptions.119 This amendment has transformed section 732.515 into a likely vehicle for abuse. The lack of formal requirements in the provision as a whole and the possible substantial monetary value of the items now permitted to be passed

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114. See In re Estate of Griffis, 330 So. 2d 797 (Fla. 4th Dist. 1976)(applying the common law rule).
116. See Howe v. Fry, 116 Fla. 528, 157 So. 331 (1934) (upholding a bequest to "servants in my employ at the time of my death").
117. Fenn & Koren, supra note 3, at 21-22.
under the provision are compelling reasons for enactment of more stringent formal requirements within the provision, or reenactment of the exceptions deleted in 1975.

F. Rules of Construction

Part VI of the FPC promulgates the rules applicable in construing wills. The 1975 legislature revised the organization of the first three sections for clarification. The 1975 legislature also adopted the UPC provision that the expressed intentions of the testator prevail. This addition will avoid problems of construction which may arise when applying other UPC derived provisions without this underlying assumption. Case law under part VI provisions has been a mechanical application of the rules.

G. Contracts Relating to Death

There are only two sections in part VII of the FPC. Continued from the prior probate laws, section 732.701(1) of the Florida Statutes is a "Statute of Frauds" for agreements relative to succession. The 1974 version was amended in 1975 to encompass agreements not to revoke a devise and agreements not to make a will or devise. These additions are in concert with section 2-701 of the UPC and are essential to avoid loopholes in the statute. Under the predecessor of section 732.701(1), Florida courts have recognized that antenuptial agreements are enforceable, that a promisor can be compelled to perform his contract to make a will in another's favor, and that a prior will does not qualify as an agreement to make a devise, even though it is witnessed in accordance with the statute.

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120. Id. §§ 33 & 35.
123. E.g., In re Cole's Estate, 44 Fla. Supp. 153 (Palm BCH. Cir. Ct. 1976), in which the court applied Fla. Stat. § 732.603(2) (1975) (anti-lapse); id. § 732.604 (failure of a specific devise); and id. § 732.606 (nonademption by extinction of certain devises).
126. For example, prior to the 1975 additions, an heir with priority to take under the intestate succession laws could legally enforce an oral agreement by the decedent not to make a will or devise; meanwhile, another person was prohibited from enforcing an oral contract by the decedent to make a will unless the contract complied with the statutory requirements.
127. In re Estate of Rothstein, 326 So. 2d 239 (Fla. 3d Dist. 1976).
128. Id.
129. First Gulf Beach Bank & Trust Co. v. Grubaugh, 330 So. 2d 205 (Fla. 2d Dist. 1976). In Grubaugh the testator orally promised to give her nephew her estate if he cared for her, and executed a will devising 80% of her estate to him. Later, she executed another will leaving...
Section 732.701(2) of the Florida Statutes (1977) pertains to the execution of joint or mutual wills. A 1975 legislative amendment clarified the section by expressly stating that the execution of such wills does not raise presumptions of a contract to make a will or not to revoke a will.\textsuperscript{130}

The case of \textit{Cohen v. Cohen}\textsuperscript{131} is an example of the kinds of problems created by joint wills. In this case, spouses executed joint wills devising their property to each other for life, remainder to five named beneficiaries to “share and share alike.” After the wife’s death, one of the named beneficiaries died. The husband then executed a codicil substituting another person for the deceased beneficiary. As a consequence, the four original devisees brought an action for breach of contract against the husband. The District Court of Appeal, Second District, held that there was no breach because after the execution of the codicil each devisee was entitled to the same proportion of the estate as he would have received under the original wills.\textsuperscript{132} This reasoning is correct, as far as it goes; however, if the husband had not executed the codicil (\textit{i.e.}, “had not breached”), each beneficiary would have been entitled to one quarter of the estate since the gift to the deceased devisee would have lapsed completely.\textsuperscript{133} Nevertheless, the decision is sound in view of the expressed disavowal of presumptions of contract in section 732.701(2).

The waiver of rights by a surviving spouse is governed by section 732.702 of the Florida Statutes (1977). The 1974 FPC required that spouses make a “full” disclosure of their estates to each other before a waiver executed after marriage would be recognized.\textsuperscript{134} This was changed in 1975 to require only “fair” disclosure,\textsuperscript{135} in conformity with section 2-204 of the UPC. The 1977 legislature has broadened the scope of this waiver provision by allowing a spouse to waive his intestate succession and pretermitted spousal rights as well as his elective share, homestead, family allowance and exempt property rights.\textsuperscript{136} The legislature also amended its definition of “all

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\textsuperscript{130} 1975 Fla. Laws, ch. 75-220, § 39. The former provision, FLA. STAT. § 732.701(2) (Supp. 1974), provided that “[t]he execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.”

\textsuperscript{131} 333 So. 2d 114 (Fla. 3d Dist. 1976).

\textsuperscript{132} \textit{Id.} at 117.

\textsuperscript{133} See FLA. STAT. § 732.603(2) (1977)(antilapse provision). The devisees in \textit{Cohen} were not related to the testators in any way.

\textsuperscript{134} FLA. STAT. § 732.702(2) (Supp. 1974)(amended 1975).

\textsuperscript{135} 1975 Fla. Laws, ch. 75-220, § 39.

\textsuperscript{136} 1977 Fla. Laws, ch. 77-87, § 14.
\end{flushleft}
rights” to include intestate succession and pretermitted spousal rights when this term is used in a waiver agreement.\textsuperscript{137} Enlarging the scope of spousal waiver is highly beneficial to long term estate planning because it frees the estate from unpredictable contingencies, such as, whether the spouse will take the statutory elective share rather than the will bequest.

H. More General Provisions

Part VIII of the FPC contains four general provisions not readily classified under any other part.

Disclaimers of interests are governed by section 732.801, of the Florida Statutes (1977) which was derived from previous probate law.\textsuperscript{138} The 1975 legislature added “present or future” interests to the types of interests disclaimable.\textsuperscript{139} Furthermore, the time for recording the disclaimer was reduced from one year to nine months and a provision allowing an additional six month extension was deleted.\textsuperscript{140} These changes may have been prompted by the disclaimer provision in the then proposed Tax Reform Act of 1976.\textsuperscript{141}

Under the federal statute, the effectiveness of a disclaimer under state law is immaterial. A disclaimer is effective for federal tax purposes only if it is received by the transferor’s legal representative within nine months after (a) the date of the transfer creating the interest, or (b) the date the transferee reaches age twenty-one, whichever is later. Thus, most disclaimers which are timely recorded under the FPC will meet the federal receipt requirement, but due to a recent change in the FPC, however, some may not. The 1977 legislature broadened the time for recording a disclaimer to include any time after the creation of the interest if all interested parties give written consent.\textsuperscript{142} Thus, disclaimers recorded pursuant to this provision will be ineffective under the federal statute unless the legal representative received the disclaimer.

\textsuperscript{137} Id.
\textsuperscript{139} 1975 Fla. Laws, ch. 75-220, § 40. Fla. Stat. § 732.801(1)(d) (1977) provides:
\begin{itemize}
\item[(d)] An “interest in property” that may be disclaimed shall include:
\begin{enumerate}
\item The whole of any property, real or personal, legal or equitable, present or future interest, or any fractional part, share, or portion of property or specific assets thereof.
\item Any estate in the property.
\item Any power to appoint, consume, apply, or expend property, or any other right, power, privilege, or immunity relating to it.
\end{enumerate}
\end{itemize}
\textsuperscript{140} 1975 Fla. Laws, ch. 75-220, § 40.
\textsuperscript{141} I.R.C. § 2518.
\textsuperscript{142} 1977 Fla. Laws, ch. 77-87, § 15.
within nine months after the creation of the interest, and merely delay its recording.

Section 732.802 of the Florida Statutes (1977) prevents the convicted murderer of a decedent from receiving any part of the decedent’s estate by either intestate succession or devise. In the case In re Estate of Nunnelley,\(^\text{143}\) the plaintiff was indicted for first degree murder of the decedent but pleaded guilty to manslaughter. He then attempted to gain sole ownership of real property held by himself and the decedent in a tenancy by the entirety. Section 732.802 did not apply to prevent such ownership because the plaintiff was not convicted of the crime of murder. The District Court of Appeal, Second District, resorted to the equity principle that a wrongdoer cannot profit by his acts and held that the plaintiff’s wrongful act severed the original tenancy into a tenancy in common. Consequently, the plaintiff was entitled to his half interest in the property, the other half interest descending by intestacy to the decedent’s collateral heirs. This case plainly illustrates the injustice of the murder “conviction” requirement in section 732.802. The legislature should either broaden its definition of murder for purposes of this statute or consider adopting the language of section 2-803 of the UPC, which does not require a conviction.\(^\text{144}\)

I. Production of Wills

Presently, chapter 732, part IX of the Florida Statutes (1977) contains only one provision setting forth the mechanics for production of a will. No change has been made in the section since its 1974 enactment.

J. Anatomical Gifts

Part X of the FPC pertains to anatomical gifts of parts of the body after the death of the donor. Prior to 1975, the sections of the present part X were contained in part IX. To clearly delineate the different subject matter treated, the 1975 legislature placed the anatomical gift sections under part X.\(^\text{145}\) The 1977 legislature added section 732.9185 of the Florida Statutes (1977) to this part.\(^\text{146}\) Effective July 1, 1977, the section sets forth the conditions under which a medical examiner may remove a decedent’s cornea upon request of an eye bank. It also exempts the medical examiner from civil or

\(^{143}\) 343 So. 2d 657 (Fla. 2d Dist. 1977).

\(^{144}\) Fenn & Koren, supra note 3, at 41.

\(^{145}\) 1975 Fla. Laws, ch. 75-220, § 45.

\(^{146}\) 1977 Fla. Laws, ch. 77-172, § 1.
criminal liability for failure to obtain consent by the next of kin. 147
The provision is an extremely useful guide for medical examiners
and is consistent with the other provisions in part X.

IV. Administration of Estates

Chapter 733 of the Florida Statutes (1977) delineates the procedures to be followed during the administration of the probate estate. It is arranged substantially in chronological order, beginning with the admission of the will to probate and concluding with the final distribution of assets and discharge of the personal representative. There are nine parts in this chapter, each of which will be discussed separately.

A. General Provisions

Chapter 733, part I of the Florida Statutes (1977) contains those statutes which generally describe the administration of estates, but do not fit neatly within the chronological scheme of chapter 733. Section 733.103 148 governs the effect of probate. It provides:

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147. Id. This section provides:

**Corneal removal by medical examiners.**—

(1) In any case in which a patient is in need of corneal tissue for a transplant, a district medical examiner or associate medical examiner may, upon request of any eye bank authorized under s. 732.918, provide the cornea of a decedent whenever all of the following conditions are met:

(a) A decedent who may provide a suitable cornea for the transplant is under the jurisdiction of the medical examiner and an autopsy is required in accordance with s. 406.11.

(b) No objection by the next of kin of the decedent is known by the medical examiner.

(c) The removal of the cornea will not interfere with the subsequent course of an investigation or autopsy.

(2) Neither the district or associate medical examiner nor any eye bank authorized under s. 732.918 may be held liable in any civil or criminal action for failure to obtain consent of the next of kin.


148. 1977 Fla. Laws, ch. 77-174, § 1 (amending **Fla. Stat.** § 733.103 (1975), codified at **Fla. Stat.** § 733.103 (1977)).

In 1977 Fla. Laws, ch. 77-87, § 17, the phrase “competency of the testator” in subsection (2) was deleted. It was replaced by the more specific terms “that it was executed free of fraud, duress, mistake, and undue influence by a competent testator.” It is unclear at the time of this writing whether the 1977 legislature intended to supersede the ch. 77-87 amendment when it enacted ch. 77-174, or whether the legislature overlooked the fact that the technical amendment of ch. 77-174 would have the effect of repealing the substantive change enacted earlier in the session.

The problem with the original “competency of the testator” language is that the statute could be construed to permit collateral litigation of the issues of fraud, duress, etc., because a testator could be deemed competent and still execute a will tainted by fraud.
(1) Until admitted to probate in this state or in the state where the decedent was domiciled, the will shall be ineffective to prove title to . . . property of the testator.

(2) In any collateral action or proceeding relating to devised property, the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator . . . and of the fact that the will was unrevoked on the testator's death.

Under the 1974 FPC, this section provided that the will of a Florida resident was ineffective to prove title to property unless the will was admitted to probate in Florida. 149 In 1975, the legislature amended this section to remove this vestige of parochialism. 150 The new provision permits proof of title by a will admitted to probate in Florida or in the state where the decedent was domiciled. It is important to note that under section 731.201, 151 "residence" and "domicile" are equivalent terms. 152 Thus, where a decedent had two residences, this provision would be applicable to a will probated in either residence. This change eliminates unnecessary proceedings and expenses by recognizing that other states, as well as Florida, are competent to probate wills, establish their validity and protect interests in Florida property.

Unfortunately, the legislature chose to retain its parochial views in section 733.103(2) of the Florida Statutes (1977), and only Florida probated wills are protected from collateral attack. Perhaps this can be justified on the grounds that Florida may have different standards in determining due execution, competency and prior revocation, and may want to protect Florida residents under Florida standards. This policy consideration, however, is outweighed by the need for finality and the elimination of unnecessary expenses.

The Florida legislature responded to another early criticism of the 1974 FPC by amending section 733.104, 153 which governs the effect of the decedent's death on the generally applicable statute of limitations. The 1974 FPC provided that the statute of limitations on a decedent's cause of action would be suspended for twelve months after the issuance of letters of administration in favor of the personal representative. 154 However, the legislature omitted the

149. FLA. STAT. § 733.103 (Supp. 1974)(amended 1974); see Fenn & Koren, supra note 3, at 618.
150. 1975 Fla. Laws, ch. 75-220, § 48. This change was recommended in Fenn & Koren, supra note 3, at 618.
151. FLA. STAT. § 731.201 (1977).
152. See note 9 supra.
153. 1977 Fla. Laws, ch. 77-174, § 1 (amending FLA. STAT. § 733.104 (1975)).
counterpart section\textsuperscript{155} of the former probate laws, which provided for
the suspension of the statute of limitations in favor of a creditor
after a claim has been filed against the deceased debtor's estate. The 1975 amendment corrected this error by inserting a similar
provision into section 733.104(2).\textsuperscript{156}

Prior to this insertion, however, the language of the predecessor
statute was amended. The amendment is significant since it
changes prior case law. The former probate law provided that “[i]f
a person against whom a cause of action exists dies before the expi-
ration of the time limited for commencement thereof and the cause
of action survives, claim shall be filed thereon and like proceedings
had as in the case of other claims against the estate.”\textsuperscript{157} The current
provision adds to the former section the phrase: “notwithstanding
the expiration of the time limited for commencement of the action.”

The addition of this phrase should effectively overrule Azaroglu v. Jordan.\textsuperscript{158} In that case the District Court of Appeal, Third Dis-
trict, held that the wage claims statute of limitations prohibited the
claimant from recovering back wages in an action against the dece-
dent's estate, despite the timely filing of the claim in the probate
court. The court based its ruling upon the principle that “when two
statutes of limitation are applicable to a particular situation, both
statutes limit the time in which an action may be brought and the
dilatory litigant is caught by whichever runs first.”\textsuperscript{159} The current
statute should make it clear that, in such a case, the only applicable
statute of limitation is section 733.104. Thus, there is no conflict
between two statutes of limitation and the principle enunciated in
Azaroglu is inapplicable.

The one remaining problem with section 733.140 is its title,
which indicates that the section applies only to personal representa-
tives.\textsuperscript{160} The title should be amended to read: “Suspension of stat-
utes of limitation in favor of the personal representative and claim-
ants.”\textsuperscript{161} Such an amendment would reflect accurately the contents
of the statute.

Another of the generally applicable provisions of part I, section

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\item 156. 1975 Fla. Laws, ch. 75-220, § 48 (current version at Fla. Stat. § 733.104(2) (1977)).
\item 158. 270 So. 2d 422 (Fla. 3d Dist. 1972), cert. denied, 275 So. 2d 12 (Fla. 1973).
\item 159. Id. at 423.
\item 160. Fla. Stat. § 733.104 (1977) is entitled: “Suspension of statutes of limitation in favor of the personal representative.” This corresponds to the title of Fla. Stat. § 734.27 (1973), from which subparagraph (1) of § 733.104 is derived.
\item 161. Fla. Stat. § 734.28 (1973), from which subparagraph (2) of § 733.104 is derived, was entitled: “Suspension of statutes of limitations in favor of claimants.”
\end{itemize}
733.105,\(^{162}\) governs the procedures to be followed in the determination of beneficiaries. The 1974 FPC required a hearing prior to the entry of an order determining a beneficiary's entitlement to a portion of the decedent's estate, but did not require any formal notice prior to the hearing.\(^{163}\) In 1975, the legislature amended this section specifically to require such formal notice to all interested persons except creditors.\(^{164}\) Although prior to this amendment informal notice was required under the Florida Probate and Guardianship Rule 5.040, the more stringent requirement of formal notice is well founded.\(^{165}\) Formal notice insures that the proper person will receive the notice, and provides a convenient method of proof in the event of a dispute over the receipt of notice.

The payment of costs and attorney's fees in probate proceedings, other than those incurred in connection with the personal representative,\(^{166}\) is governed by section 733.106.\(^{167}\) Under this section, there are two situations in which attorney's fees may be awarded. The first is where the person nominated as personal representative of the last known will in good faith offers the will for probate, even though he is unsuccessful.\(^{168}\) The second situation occurs when an

\(^{162}\) FLA. STAT. § 733.105 (1977).
\(^{165}\) The primary difference between formal and informal notice is that informal notice only requires service by regular mail or delivery. See FLA. R. Civ. P. 1.040. Formal notice requires either service by a form of mail requiring a signed receipt, service of process by the sheriff pursuant to FLA. STAT. §§ 48.011-.23 (1977) or constructive service of process pursuant to id. §§ 49.011-.12.
\(^{166}\) FLA. STAT. § 733.617 (1977) governs compensation of personal representatives and professionals, including attorneys, employed by the personal representative.
\(^{167}\) Id. § 733.106.
\(^{168}\) This situation was derived from FLA. STAT. § 732.14(3) (1973), was enacted in § 733.106 of the 1974 FPC, and remains virtually unchanged in the current provision. The District Court of Appeal, Third District, recently examined the "good faith" requirement in In re Estate of Weinstein, 339 So. 2d 700 (Fla. 3d Dist. 1976)(per curiam). There, Gabrielle Nash, the unsuccessful proponent of a will, was the sole beneficiary under a will executed on May 29, 1973. Another will, dated May 24, 1973, was presented at the same time to the probate court. The May 24th will named the decedent's children and grandchildren as primary beneficiaries and was subsequently probated as the decedent's last will and testament.

The trial court predicated its award of attorney's fees to Nash on its findings of fact. First, the decedent died with three known wills: a November, 1972 will in which his children and grandchildren were substantially disinherited; a May 24, 1973 will in favor of the children and grandchildren; and a May 29, 1973 will in favor of Nash. Secondly, on April 23, 1973, the decedent entered into a contract for the sale of land to Nash. In a subsequent court proceeding which challenged the validity of this contract, the decedent was found competent to enter into the contract.

The District Court of Appeal, Third District, held that under these facts the trial court did not abuse its discretion in finding that Nash and her attorney were justified in believing that the decedent was competent at the time he executed the will and in offering the will for probate.
attorney "has rendered services to an estate," although not employed by the personal representative. This second situation, although enacted under the old probate laws, was omitted from the 1974 FPC. The current provision was inserted in a 1975 amendment. Unfortunately, the legislature bypassed an opportunity to clarify the meaning of the phrase "services to an estate." Thus, it appears that the test will remain one of pecuniary benefit to the estate.

Utilizing the pecuniary benefit test, the probate court in *In re Estate of Freedman* properly refused to award attorney's fees to the surviving daughter of the decedent. The daughter had successfully brought an independent action to impress a constructive trust on legacies bequeathed to her two half-sisters. In affirming the action of the probate court, the District Court of Appeal, Third District, emphasized that "the distribution was not changed, but rather a constructive trust was placed on the distributive share of the legatees by means of a separate action . . . [and] the estate was not enhanced thereby." Thus, although apparently some type of fraudulent or other misuse of the estate's assets was prevented, there was no "service to the estate" and attorney's fees could not be awarded. Cases such as this should serve to encourage the Florida legislature to amend section 733.106 to provide attorney's fees for nonpecuniary services to the estate.

Section 733.109, the final section of chapter 733, part I, of the Florida Statutes (1977), delineates the persons entitled to bring a petition for revocation of probate and sets forth the effect of such revocation. Under the 1974 FPC, this statute provided that, ex-

170. This omission was criticized in *Fenn & Koren,* supra note 3, at 679-80.
173. The problems encountered in the construction of this language are discussed in *Fenn & Koren,* supra note 3, at 679-81.
174. 340 So. 2d 1275 (Fla. 3d Dist. 1977)(per curiam).
175. Although the opinion of the court does not recite any facts surrounding the imposition of the constructive trust, it is safe to assume that it was imposed to effectuate an equitable distribution of property or otherwise prevent some fraudulent use of the property. See 33 *Fla. Jur. Trusts* §§ 61-71 (1960). In addition, the court does not indicate whether this case arose under the old or new probate laws. This omission by the court, however, seems insignificant in light of the substantial similarity between the old and new provisions.
176. 340 So. 2d at 1275.
178. The 1977 amendments to this statute create confusion similar to that encountered in connection with *Fla. Stat.* § 733.103 (1975). See note 148 supra. The substantive amendment in 1977 *Fla. Laws,* ch. 77-87 was effectively repealed by the technical amendment of *id.* ch. 77-104. The necessity for the reinsertion of the substantive amendment is discussed in the text accompanying notes 183-90 infra. The current statute provides:
cept for limiting distributions, the pendency of a revocation proceeding would not interfere with the administration of the estate by the personal representative, and that the subsequent revocation of probate would not affect the rights of a good faith purchaser of property from the personal representative. 179

Another statute, section 733.212,180 delineated the persons entitled to file objections challenging the validity of the will and the attendant procedures to be followed. Under section 733.212, all “interested persons” were permitted to file objections. Early commentators181 criticized this provision because of the very broad definition given to the term “interested persons” under the 1974 FPC.182 In 1975, amendments by the Florida Legislature narrowed the scope of section 733.212183 and, in effect, transferred a part of this section into section 733.109.184 The 1975 changes limited the application of section 733.212 to interested persons to whom notice of administration was mailed by the personal representative. This class of interested persons is implicitly defined by section 733.212(1), which requires the personal representative to serve notice only to the surviving spouse and all known beneficiaries. The personal representative

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**Revocation of probate.**

1. Any interested person, including a beneficiary under a prior will, except those barred under s. 733.212 or s. 733.2123, may, before final discharge of the personal representative, petition the court in which the will was admitted to probate for revocation of probate.
   
   (a) The petition shall state the interest of the petitioner and the grounds for revocation.
   
   (b) The petition shall be served upon the personal representative and all interested persons by formal notice, and thereafter proceedings shall be conducted as an adversary proceeding under the rules of civil procedure.

2. Pending the determination of any petition for revocation of probate, the personal representative shall proceed with the administration of the estate as if no revocation proceeding had been commenced, except that no distribution may be made to devisees in contravention of the rights of those who, but for the will, would be entitled to the property disposed of.

3. Revocation of probate of a will shall not affect or impair the title to the property theretofore purchased in good faith for value from the personal representative.

**FLA. STAT.** § 733.109 (1977).


180. Id. § 733.212. There is some confusion regarding the section number of this statute. In 1974 Fl. Laws, ch. 74-106, § 1 and 1975 Fl. Laws, ch. 77-220, § 60, as well as in Fenn & Koren, *supra* note 3, *passim*, this statute is numbered § 733.210. In the official codification, however, the section is referred to as **FLA. STAT.** § 733.212 (1977).


182. **FLA. STAT.** § 731.201(17) (Supp. 1974)(amended 1975). As discussed in the text accompanying notes 27-29 *supra*, the definition of “interested person” was narrowed by the 1975 legislature.

183. 1975 Fl. Laws, ch. 75-220, § 60.

184. Id. § 50.
may, in addition, serve notice to other heirs or devisees under a known prior will. Thus the trigger that brings section 733.212 into operation is the notice given by the administrator. Once the notice is given, the notified person has three months to file any objections or claims against the estate.

A concurrent amendment to section 733.109 expanded that section to define another class of persons entitled to petition the court for revocation of probate.\footnote{186} The new class was defined by the 1975 legislature to include "[a]ny beneficiary, including a beneficiary under a prior will."\footnote{186} A beneficiary is defined as an "heir at law, in an intestate estate; devisee, in a testate estate; and the owner of a beneficial interest, in a trust."\footnote{187} Thus under section 733.109, an heir at law in a testate estate, who by definition is not a beneficiary, cannot use this section to challenge the validity of a will.\footnote{188}

In short, there is no way for an heir at law to challenge the validity of a will that excludes him, unless the personal representative has gratuitously given him notice of administration under section 733.212. Even then, it is unclear whether he would be able to make such a challenge, since section 733.212 could be interpreted as a provision which governs only the time limit in which a claim can be made, rather than empowering persons excluded from section 733.109 to file objections.\footnote{189} The legislature should remedy this confusion and simplify the revocation procedures by returning to the concept that an interested person may petition to revoke probate. Similarly, notice of administration ought to be served upon these same interested persons, rather than a select few at the discretion of the personal representative. In the final analysis, due process principles seem to require that "person[s] who may reasonably be expected to be affected by the outcome of the . . . proceeding"\footnote{189} should be given notice of that proceeding and likewise, those persons ought to be able to challenge the validity of that proceeding (i.e., the probate of the will).

\footnote{185} Id.
\footnote{186} Id. (current version at FLA. STAT. § 733.109 (1977)).
\footnote{187} FLA. STAT. § 731.201(2) (1977).
\footnote{188} It is interesting to note that the 1977 legislature remedied this defect with the enactment of 1977 Fla. Laws, ch. 77-87, § 18, in which the term "beneficiary" was changed to "interested person." Under the current definition of interested person, this would appear to protect the necessary persons without opening a floodgate of litigation which could result in undue delay and expense. Unfortunately, in 1977 Fla. Laws, ch. 77-104, § 227, the term "interested person" was changed back to "beneficiary."
\footnote{189} This possible interpretation is supported by the statutory classification of § 733.109 in part I, which sets forth general provisions, and the classification of § 733.212 in part II, which delineates the procedures to be followed by the personal representative in commencing administration.
\footnote{190} This is the definition of "interested person" under FLA. STAT. § 731.201(21) (1977).
B. **Commencing Administration**

Chapter 733, part II of the Florida Statutes (1977) delineates the procedures and prerequisites for the admission of a will to probate and for the appointment of a personal representative. The first statute in this part, section 733.201,\(^1\) governs the initial proof required prior to the admission of a will to probate. In the 1974 FPC, this statute provided:

1. Wills other than wills that are self-proved may be admitted to probate upon the oath of any attesting witness . . . .
2. If it appears to the court that the attesting witnesses [are unavailable] a will may be admitted to probate upon the oath of the personal representative . . . whether he is interested in the estate or not, or of any person having no interest in the estate under the will, that he believes the writing exhibited to be the true last will of the decedent.\(^2\)

This section was criticized by early commentators since it omitted provisions regarding the admissions of self-proved wills into probate. Another noted defect was that it permitted a court-appointed personal representative as well as a personal representative nominated by will to give the requisite oath where the attesting witnesses were unavailable.

The 1975 legislature amended this section to remedy these difficulties.\(^3\) First, a subsection was added to admit self-proved wills into probate without further proof. Second, the legislature restricted the provision which permits an oath by an interested person in cases of unavailable attesting witnesses to personal representatives nominated by will.

After the will is admitted to probate, a verified petition for administration may be filed.\(^4\) In certain cases, notice of this petition must be given prior to the entry of an order appointing a personal representative. Section 733.203\(^5\) governs the notice requirement. Under the 1974 FPC, the only notice required was to persons entitled to equal or greater preference than the applicant as personal representative.\(^6\) In 1975, a new subsection was added to re-

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1. Id. § 733.201.
6. Id. § 733.203.
7. The mandatory nature of the notice to persons entitled to preference over the applicant is well established. Failure to give such notice will render the granting of letters of administration void ab initio. In re Estate of Baker, 339 So. 2d 240 (Fla. 3d Dist. 1976). In Baker, the decedent's mother petitioned the court for letters of administration. At the time
quire notice where "a caveat has been filed by an heir or a devisee under a will other than that being offered for probate."\textsuperscript{198} The procedure to be followed is specified in another, otherwise discretionary, statute, section 733.2123.\textsuperscript{199} This statute was also created by the 1975 legislature,\textsuperscript{200} and provides:

A petitioner may serve formal notice of his petition for administration on interested persons. No person who is served with formal notice of the petition for administration prior to the issuance of letters or who has waived notice may challenge the validity of the will, testacy of the decedent, qualifications of the personal representative, venue, or jurisdiction of the court, except in connection with the proceedings before issuance of letters.

The only remaining statute in this part which merits discussion is section 733.207,\textsuperscript{201} which governs the establishment and probate of lost or destroyed wills. This provision in the FPC is substantially the same as the enactment in the 1973 probate laws.\textsuperscript{202} It is well

the letters were granted, the court was informed that the decedent’s widow had been badly burned in the same accident which caused the death of her husband, and was therefore incapacitated and unable to serve as administratrix. There was no explanation, however, regarding the failure to serve notice to the widow as required by statute. See Fla. Stat. § 732.43(3) (1971)(the substantially similar predecessor to Fla. Stat. § 733.203(2) (1975)). Therefore, the District Court of Appeal, Third District, held that the trial court properly granted the widow’s subsequent petition for the removal of the administratrix. The court, however, failed to discuss the second prerequisite to the mandatory notice provision. That is, in addition to being entitled to preference by statute, the person to whom notice must be given must be qualified to act as administrator. Under both Fla. Stat. § 732.45 (1973), the statute in effect at the time this case arose, and Fla. Stat. § 733.303(1)(b) (1977), the current statute, the widow would not have been qualified to serve due to her physical incapacitation. This, of course, does not answer the issue of whether the widow would be entitled to petition the court for revocation of previously issued letters upon termination of her disability. Under prior law, this would probably be permitted. See Fenn & Koren, supra note 3, at 632; cf. Fla. Stat. § 732.46 (1973)(when a person otherwise entitled to preference is incompetent due to minority at the time the letters are issued, he may petition the court for revocation of the previously issued letters upon attaining majority). This section, however, was omitted from the 1974 FPC, and under current law it is doubtful that such a change in personal representatives would be granted. See Fenn & Koren, supra note 3, at 632. In this connection, it is interesting to note that in 1977 the Florida Legislature amended Fla. Stat. § 733.301(5) (1975) to provide for such a revocation petition by a "person who is entitled to and has not waived preference over the person appointed at the time of his appointment." 1977 Fla. Laws, ch. 77-87, § 21 (emphasis added). Later in the session, however, id. ch. 77-174, § 1 was enacted and the emphasized words were omitted. Since the Florida Statutes do not have legislative histories, it is impossible to do more than speculate as to the significance of these changes.

For a discussion of similar problems with the multiple enactments of the 1977 legislature, see notes 148, 178 & 188 supra.

200. 1975 Fla. Laws, ch. 75-220, § 60. Note that this statute was renumbered from § 733.211 in the session laws to § 733.2123 in the official reporter.
settled that a lost will gives rise to the presumption that the testator destroyed the will with the intention of revoking it.203 The District Court of Appeal, Fourth District, recently discussed the sufficiency of evidence needed to rebut this presumption. In *In re Estate of Baird*,204 the trial court admitted to probate an executed copy of the decedent’s will and denied the petition brought by the heirs at law to revoke probate. The will provided that in the event his wife should predecease him, the decedent’s estate should go to his wife’s sister, Barricklow. The wife predeceased the testator. Subsequent to her death, the testator executed a codicil which reaffirmed the earlier will and provided for the appointment of a personal representative. The decedent never remarried and lived alone until his death three years later. The codicil was found in a box of business papers, but the original will was never found. Thus a presumption arose that the will had been revoked. Barricklow relied upon the following evidence to sustain the validity of the executed copy: (1) at the time the decedent’s papers were discovered, which was shortly after his death, his apartment (but not the box containing the papers) was in a state of disarray and had been open and accessible to other unknown persons; (2) up until the time of his death, the decedent expressed his continued fondness and warm feelings for Barricklow and her son; and (3) the decedent had become very forgetful toward the end of his life. The District Court of Appeal, Fourth District, reversed the decision of the trial court and held that none of this evidence was sufficient to rebut the presumption of revocation. Treating each piece of evidence separately, the court grounded its holding on the bases that: (1) the only person with an adverse interest to the will was hundreds of miles away at all relevant times; (2) statements of a decedent cannot serve alone to rebut the presumption of revocation; and (3) evidence as to the decedent’s mental condition was insufficient to establish that he was incompetent during the period in which he might have revoked his will.

This case illustrates both the dangers of permitting a testator to execute a duplicate as well as an original will, namely allowing the testator to mistakenly rely on the validity of the duplicate, and the difficulty in rebutting the presumption of revocation.

203. See, e.g., Schaefer v. Voyle, 88 Fla. 170, 102 So. 7 (1924); *In re Estate of Baird*, 343 So. 2d 41 (Fla. 4th Dist. 1977).

204. 343 So. 2d 41 (Fla. 4th Dist. 1977).
C. Priority to Administer and Qualifications of Personal Representatives

Chapter 733, part III of the Florida Statutes (1977) delineates the requisite qualifications and preferences which the probate court must observe in the appointment of a personal representative. One of the major objections to this part of the 1974 FPC was the confusing language of section 733.301,205 which specifies statutory preferences in the appointment of a personal representative.206 The confusion was eliminated in a 1975 amendment which substantially reworded this section.207 The current provision treats testate and intestate estates separately for purposes of determining preferences.208 It also eliminates the prior conflict which permitted the majority in interest in the estate to select a representative other than the person nominated by will, or in the case of intestacy, the surviving spouse.209 There remains, however, one possible area of confusion. The legislature has not made this statute applicable to the appointment of successor representatives. Section 733.307, which governs

206. The difficulties with FLA. STAT. § 733.301 (Supp. 1974), were explained as follows:
It attempts to combine the preferences in the case of both testate and intestate estates and, in so doing, compounds the difficulties the courts have experienced under the present preference statutes. Moreover, it seems to violate the two basic tenets for the selection of personal representatives: (1) "that a testator has the right to name the person who, after his death, shall have charge of his estate, provided that such person is not disqualified by law"; and (2) that where the decedent has not chosen his personal representative, the right to administer should follow the right to the property, since self-interest is the best assurance of a careful and expeditious administration. To give letters to the "next of kin" in the case of a testate estate where both the named executor and the spouse cannot or do not desire to serve, will frequently be to entrust the estate to persons who will not share in its distribution but who are attracted by the prospective fees.
The likelihood of this occurring is enhanced under the new statute ....

Fenn & Koren, supra note 3, at 632-33 (footnotes omitted).

208. FLA. STAT. § 733.301 (1977). The pertinent portion of this statute provides:
In the granting of letters, the following preferences shall be observed:
(1) In testate estates:
(a) The personal representative, or his successor, nominated by the will or pursuant to a power conferred in the will.
(b) The person selected by a majority in interest of the persons entitled to the estate.
(c) A devisee under the will. If more than one devisee applies, the court may exercise its discretion in selecting the one best qualified.
(2) In intestate estates:
(a) The surviving spouse.
(b) The person selected by a majority in interest of the heirs.
(c) The heir nearest in degree. If more than one applies, the court may exercise its discretion in selecting the one best qualified for the office.

209. Id.
such a subsequent appointment, provides that “[n]o personal representative of a personal representative as such shall be authorized to administer the estate of the first decedent. On the death of the sole or surviving personal representative, the court shall appoint a successor personal representative to complete the administration of the estate.”

Under section 733.307 the court is given unlimited discretion in choosing a successor representative. The problems that may be created are illustrated in In re Estate of Drummond. There, the decedent’s son, Howard Drummond, was named by will as the sole beneficiary and executor of the estate. Drummond qualified as executor but died before the estate proceedings were completed. The remaining matters were obtaining approval of the previously filed estate tax return, filing an accounting and distributing the assets to Drummond’s estate. Jessie Smith was named as the sole executrix in Drummond’s will. She petitioned the probate court for appointment as successor executrix of the estate of Drummond’s mother. Carole Hall, Drummond’s daughter, also petitioned the probate court for appointment as administratrix of her grandmother’s estate. The probate court appointed Hall as administratrix on the ground that she was entitled to preference under section 732.44. The District Court of Appeal, First District, reversed on the ground that section 732.44 applied only to intestate estates. The appellate court also rejected Hall’s contention that she was entitled to be named executrix upon Drummond’s death since she was named in the will as contingent executrix in the event that Drummond predeceased the testator. This rejection was based on the ground that the specified contingency had never occurred. The court held that the only way to fulfill the intent of the testatrix to have her estate administered and distributed at Drummond’s direction was to appoint Drummond’s executrix, Smith, as his successor. Furthermore, Smith was not barred by the succession of administration statute since she sought appointment as the executrix of the sole beneficiary, rather than as the executrix of the executor.

Although the current preference statute, section 733.301, of the Florida Statutes (1977), applies to both testate and intestate es-

211. 341 So. 2d 225 (Fla. 1st Dist. 1977). Although Drummond was based upon the 1973 probate laws, the result would be the same under the FPC since the current statute, Fla. Stat. § 733.307 (1977), is substantially the same as its predecessor, Fla. Stat. § 732.52 (1973).
tates, similar problems could arise under it. For example, subsection (3) of the statute provides that "[a] guardian of the property of a ward who if competent would be entitled to appointment as, or to select, a personal representative may exercise the right to select the personal representative." Under this provision, the personal representative of a deceased personal representative who is also a beneficiary, may be entitled to appointment as the successor representative. The crux of the argument supporting this statutory construction is that the personal representative is in effect the guardian of the deceased (and therefore incompetent) representative's property. At the outset, it is important to note that under Drummond the succession of administration statute is inapplicable since the successor seeks appointment as the representative of a beneficiary. This argument is supported by the definitional section of the Florida Guardianship Law. A "guardian" is defined as one to whom the law has entrusted the custody and control of the property of an incompetent. An "incompetent" includes a person who, because of any physical or mental incapacity, is incapable of managing his property. A deceased person is therefore incompetent, and a personal representative has custody and control of the decedent's property. Thus, the requisites of guardianship are present, and section 733.301(3) is applicable. If the legislature did not intend this interpretation, it should clarify either the successor representative statute or section 733.301(3) in this regard.

In addition to compliance with the preference statute just discussed, the probate court must determine whether the person entitled to preference is otherwise qualified to serve as personal representative. Sections 733.302, 733.303 and 733.304 govern this determination.

Section 733.302 requires a personal representative to be both a citizen of the United States and a resident of Florida. In In re

215. Id. § 744.102.
216. Id. § 744.102(1).
217. Id. § 744.102(5).
218. It is interesting to note that the 1977 Florida Legislature amended Fla. Stat. § 733.507 (1975), which provides for the appointment of a successor personal representative upon the removal or resignation of the initial personal representative, by adding the requirement that the preferences specified in § 733.301 be observed in such appointments. 1977 Fla. Laws, ch. 77-87, § 26.
220. Id. § 733.303.
221. Id. § 733.304.
222. Fla. Stat. § 733.302 (1977), entitled "Who may be appointed personal representative," provides that "[s]ubject to the limitations in this part, any person sui juris who is a
Estate of Fernandez,223 the Supreme Court of Florida held unconstitutional the United States citizenship requirement.224 The Florida Legislature should amend this statute by eliminating the unconstitutional requirement.

The remaining portion of this statute, which imposes the Florida residency requirement, should be combined with section 733.304, which specifies exceptions to the residency requirement.225 A combined statute should facilitate proper statutory construction and eliminate problems such as the one presented in In re Jama.226 In Jama, the decedent died at sea while a crew member of a United States flagship. Pursuant to 46 U.S.C. § 626,227 his wages were paid into the registry of the federal district court. His wife, a domiciliary of Kenya, East Africa, filed a petition to obtain the wages and effects of the decedent. Under the facts of this case, 46 U.S.C. § 627 required the court to pay the wages and personal effects of the decedent to the legal personal representative of the decedent. The Kenyan personal representative was not qualified, however, since Kenyan law does not authorize a representative to dispose of assets of a decedent where those assets are located outside of Kenya. Therefore, in order to determine the representative to whom the funds should be paid, the court adopted Florida probate law.228 The

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223. 335 So. 2d 829 (Fla. 1976).

224. In Fernandez, the trial court denied letters of administration to the decedent’s husband on the grounds that he was not a United States citizen. On appeal, the Supreme Court of Florida reversed, holding that this requirement created a suspect classification based upon alienage and was violative of the equal protection clauses of the fourteenth amendment to the Constitution of the United States and article I, section 2 of the Constitution of Florida. The state’s attempt to sustain the validity of the statute on the grounds that: (1) a citizen is more likely than an alien to possess the practical experience, education and understanding of the English language necessary to administer an estate effectively; and (2) a citizen is more likely than an alien to be amenable to the service of court process, was rejected by the court. The first asserted interest is adequately protected by the competency requirement in Fla. Stat. § 733.302 (1977), and the bond requirement in § 733.402(1). The second interest is adequately protected by the residency requirement in § 733.302, the general service of process statute, § 48.031, and the Florida long arm statute, § 48.193.

225. Fla. Stat. § 733.304 (1977), entitled “Nonresidents,” provides:
A person who is not domiciled in the state cannot qualify as personal representa-
tive unless the person is:
(1) A legally adopted child or adoptive parent of the decedent;
(2) Related by lineal consanguinity to the decedent;
(3) A spouse or a brother, sister, uncle, aunt, nephew, or niece of the dece-
dent; or
(4) The spouse of a person otherwise qualified under this section.


228. There is no federal law regarding the appointment of personal representatives in such cases.
court rejected the widow’s petition on the grounds that she did not qualify since she was not a Florida resident. The court stated that it would be “imprudent” to appoint her representative since she was in Kenya, and not subject to the court’s jurisdiction. This analysis fails to consider the effect of section 733.304, which permits a non-domiciliary spouse to qualify as personal representative. The court also failed to note that under section 734.102(1), where the decedent dies intestate and the foreign domiciliary personal representative is not qualified to act in Florida, the preference statute applies. Thus, in Jama, the decedent’s widow should have been appointed personal representative.

D. Appointment of Personal Representative: Bonds

Once a court determines that a person is entitled and qualified to be personal representative pursuant to part III of the FPC, the next step is to appoint that person and determine the appropriate bond. This procedure is prescribed under part IV of the FPC. The only noteworthy change in this part since the 1974 FPC is the 1977 amendment of section 733.401. Prior to the amendment, this section provided:

**Issuance of letters—**

(1) After the petition for administration is filed:
   (a) The will, if any, shall be proved as provided elsewhere in this code and shall be admitted to probate.
   (b) The court shall appoint the person entitled and qualified to be personal representative.
   (c) The court shall determine the amount of any bond required under this part. The clerk may approve the bond in the amount determined by the court and shall not charge a service fee.
   (d) Any required oath or designation of, and acceptance by, a resident agent shall be filed.
(2) Upon compliance with all of the foregoing, letters shall be issued to the personal representative.
(3) The failure to file any items under subsections (c) and (d) shall not be jurisdictional. The 1977 amendment amended subsection (3), which now provides that “(3) Mistaken noncompliance with any of the requirements of

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229. 436 F. Supp. at 966.
231. Id. § 734.102(1).
subsection (1) shall not be jurisdictional." This amendment seems advantageous since it will permit correction of all mistaken noncompliance with minimal disruption of the ongoing probate proceedings.

E. Curators; Successor Personal Representatives; Removal

Chapter 733, part V of the Florida Statutes (1977) specifies the procedures concerning the interruption of administration due to the resignation or removal of the personal representative. Aside from the previously discussed amendment to section 733.507, the only recent developments in this part concern section 733.504, which specifies the causes of removal of personal representatives. The 1974 FPC omitted the section of the 1973 probate laws that permitted removal upon "[f]ailure of the resident personal representative removing from the state to designate a resident agent." In 1975, the legislature rectified this omission by providing for the removal of a personal representative who removes his domicile from Florida if he is no longer qualified under part III of chapter 733. The

235. See note 218 supra.
236. FLA. STAT. § 733.504 (1977) provides:

Causes of removal of personal representative.—

A personal representative may be removed and his letters revoked for any of the following causes, and the removal shall be in addition to any penalties prescribed by law:

(1) Adjudication of incompetency.
(2) Physical or mental incapacity rendering him incapable of the discharge of his duties.
(3) Failure to comply with any order of the court, unless the order has been superseded on appeal.
(4) Failure to account for the sale of property or to produce and exhibit the assets of the estate when so required.
(5) The wasting or maladministration of the estate.
(6) Failure to give bond or security for any purpose.
(7) Conviction of a felony.
(8) Insolvency of, or the appointment of a receiver or liquidator for, any corporate personal representative.
(9) The holding or acquiring by the personal representative of conflicting or adverse interests against the estate that will or may adversely interfere with the administration of the estate as a whole. This cause of removal shall not apply to the surviving spouse because of the exercise of the right to the elective share, family allowance, or exemptions, as provided elsewhere in this code.
(10) Revocation of the probate of the decedent's will that authorized or designated the appointment of such personal representative.
(11) Removal of domicile from Florida, if the personal representative is no longer qualified under part III of this chapter.

237. FLA. STAT. § 734.11 (1973)(amended 1974). For a discussion regarding the consequences of the omission, see Fenn & Koren, supra note 3, at 631-32, 643-44.
238. 1975 Fla. Laws, ch. 75-220, § 69 (current version at FLA. STAT. § 733.504 (1977)).
amended provision is stricter than the one in the 1973 probate laws since it provides for removal whenever a personal representative leaves the state, whether or not a resident agent has been appointed. The provision is undesirable since the appointment of a new representative may involve substantial cost and interested persons are adequately protected by the appointment of a resident agent. Particularly in a case where there are few remaining duties, such appointment is unnecessary to the efficient completion of administration. 239

It is important to note that removal of a personal representative lies within the sound discretion of the court and that the specified causes are permissive and not mandatory. This is illustrated in In re Estate of Murphy, 240 where the District Court of Appeal, Fourth District, refused to reverse the trial court's denial of a motion by the sole beneficiary to remove a co-personal representative. The grounds alleged for removal were the failure to timely file accountings, the obtention without notice of an order allowing partial attorney's fees, and the disenchantment of the sole beneficiary with the co-personal representative. The appellate court emphasized that the personal representative was personally chosen by the decedent to manage his estate and that the trial court could have properly found that the continued service of the personal representative would not prejudice or endanger the estate. The Murphy decision illustrates the broad discretion given to the trial court in determining whether to remove a representative.

F. Duties and Powers of Personal Representatives

Part VI of the FPC specifies the manner in which the personal representative should administer the estate. Section 733.602 241 describes the general duties of the personal representative. Under the 1974 FPC, this section provided that the personal representative had a fiduciary obligation only to the beneficiaries of the estate. Early commentators noted that this provision changed existing case

The exceptions to the domiciliary requirement are listed in Fla. Stat. § 733.304 (1977). For further discussion of this subsection, see the text accompanying note 225 supra.

239. Although, as noted in Fenn & Koren, supra note 3, at 631, the current FPC eliminates the former provision which required designation of a resident agent prior to the issuance of letters of administration, Fla. Stat. § 732.45(2) (1973), the current Fla. Prob. & Guard. Rule 5.110 still requires such appointment. Furthermore, the committee note indicates that this requirement is the implementation of Fla. Stat. § 733.401(1)(d)(1977). Thus, as the Penn & Koren article previously surmised, the legislature's omission was not a desire to eliminate this requirement, but only to treat it as a procedural rather than jurisdictional matter. Fenn & Koren, supra note 3, at 631-32.

240. 336 So. 2d 697 (Fla. 4th Dist. 1976).

law since it did not impose a fiduciary obligation on the personal representative to creditors of the estate. An early 1977 amendment corrected this omission by providing that the personal representative should use his authority for the best interests of interested persons. As previously discussed, the term "interested persons" includes creditors. Under a subsequent enactment, however, the statutory language was changed from "interested persons" back to "beneficiaries." This subsequent amendment was technical in nature, and as previously discussed, the legislature probably did not intend it to supersede the earlier substantive amendment. This confusion illustrates the need for more careful legislative draftsmanship and a legislative history to determine the intent of the legislators.

Another early criticism of the 1974 FPC was directed against section 733.607, which permitted the personal representative to acquire the estate, and section 733.608, which permitted the personal representative to dispose of assets to fulfill various obligations. Neither of these statutes excludes the homestead from its operation. Therefore, under these statutes, the personal representative would be allowed to oust the surviving spouse of possession and dispose of the homestead. In 1977, the legislature responded to this problem by amending both statutes to exclude the homestead.

The specific transactions in which the personal representative may engage are set forth in section 733.612. This section is derived from the UPC and is designed to give the personal representative broad discretion in administering the estate and thereby reduce unnecessary transaction costs. Commentators criticized this section since it omitted the UPC provision which specifically gave the personal representative the power to "act without independent investigation upon [an agent's] recommendations; and instead of

242. Fenn & Koren, supra note 3, at 646 n.604.
244. See text accompanying notes 27-29, 182 supra.
246. See notes 148, 178, 188 supra.
247. See Fenn & Koren, supra note 3, at 649.
249. Id. § 733.608.
250. Section 733.608 specifies these obligations as: "(1) For the payment of devises, debts, family allowance, estate and inheritance taxes, claims, charges, and expenses of administration; (2) To enforce contribution and equalize advancement; and (3) For distribution." FLA. STAT. § 733.606 (1977).
253. UNIFORM PROBATE CODE § 3-715.
acting personally, employ one or more agents to perform any act of administration, whether or not discretionary."255 The 1975 legislature remedied this omission by inserting the above quoted language into section 733.612(19), which now provides:

[A] personal representative . . . may properly:

(19) Employ persons, including attorneys, accountants, auditors, investment advisors, and others, even if they are one and the same as the personal representative or are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act upon the recommendations of such employed persons without independent investigation; and, instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary.256

This amendment, in conjunction with the remainder of the statute, gives the personal representative the flexibility to manage the estate in an efficient manner.

The personal representative’s power to dispose of real property is governed by section 733.613.257 Where the decedent dies intestate or where no power of sale has been conferred upon the personal representative by will, this section gives the personal representative power to sell property when it is in the best interests of the estate. Title passes when the sale is authorized and confirmed by the court. Furthermore, bona fide purchasers are not required to examine any proceedings before the order of sale. Apparently, this provision protects bona fide purchasers so long as the order of sale by the court is valid on its face. Section 733.613 should facilitate the sale of real property by eliminating the problems encountered by purchasers of real property under the 1973 probate laws,258 as illustrated in Neely v. Bruten.259 There, the former administratrix of the decedent’s estate conveyed certain property to the Neelys. The conveyance was made pursuant to the order of the county judge having charge of the estate. Subsequent to this conveyance, the county judge vacated the order at the instance of an heir who claimed to have had no notice of the proposed sale. The Neelys were not parties to the estate proceedings and they neither received notice nor had the opportunity to be heard prior to the revocation of the order authorizing sale. Subsequent to the revocation, the Neelys petitioned for reconsidera-

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255. Uniform Probate Code § 3-715(21).
257. Id. § 733.613.
259. 339 So. 2d 1126 (Fla. 1st Dist. 1976).
tion of the order which adversely affected their deed and title, and for a declaratory judgment establishing the validity of their deed. The trial court denied the petition for reconsideration and entered summary judgment against the Neelys in the declaratory judgment action. The basis for the trial court ruling was that all issues had been determined by the order of revocation. The District Court of Appeal, First District, reversed the judgment of the trial court on the ground that the Neelys could not be bound by determinations made by the probate court in proceedings to which they were not parties. The problem with this case is that it does not recognize any protection to bona fide purchasers who act pursuant to a court order which is valid on its face. The concurring opinion by Chief Judge Boyer underscores this problem.

Under the Neely rationale, a purchaser could safely acquire property from an estate only after thoroughly investigating all proceedings surrounding the issuance of the court order. The deterrent effect and expense of imposing this burden is obvious. The FPC provision should eliminate this hazard.

The compensation of the personal representative and his agents is governed by section 733.617. This section provides that reasonable compensation shall be paid, and enumerates the factors to be considered in determining reasonableness.

(3) No compensation shall be paid to the personal representative or attorneys, unless, prior to payment:

(a) All persons bearing the impact of the payment have consented to the compensation or the method of determining compensation in a signed writing filed in the proceeding; or

(b) The court has ordered the payment following notice of the petition to all persons bearing the impact of the payment.
In 1976, the legislature eliminated this cumbersome and expensive procedure.\textsuperscript{265} In its place the legislature added section 733.6175, which provides:

\textbf{Proceedings for review of employment of agents and compensation of personal representatives and employees of estate.}\textemdash After notice to all affected interested persons and upon petition of an interested person bearing all or part of the impact of the payment of compensation to the personal representative or any person employed by him, the propriety of such employment and the reasonableness of the compensation or payment may be reviewed by the court. The burden of proof of propriety of such employment and the reasonableness of the compensation shall be upon the personal representative and the person employed by him. Any person who is determined to have received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.\textsuperscript{266}

Thus the burden of allegation has been shifted to the person challenging the payment. This should avoid a significant number of costly and unnecessary proceedings.

The final provision of part VI, section 733.619,\textsuperscript{267} concerns the individual liability of the personal representative. The statute is derived from the UPC\textsuperscript{268} and was added in 1975 after early commentators objected to its omission.\textsuperscript{269} It protects the personal representative from personal liability in two instances: (1) a personal representative is not personally liable on a contract into which he entered in his fiduciary capacity, except a contract for attorney's fees, unless he fails to reveal his representative capacity and identify the estate in the contract; and (2) a personal representative is liable for obligations arising out of the estate and torts committed in the course of administration only if he is personally at fault. The addition of this statute is significant since under common law the representative could be held personally liable on all contracts and for all torts.\textsuperscript{270}

\textbf{G. Creditors' Claims}

Chapter 733, part VII of the Florida Statutes (1977) governs the presentation and payment of claims against the estate. The time limitation on the presentation of claims is specified in section

\begin{footnotes}
\item[265] 1976 Fla. Laws, ch. 76-172, § 1.
\item[267] Id. § 733.619.
\item[268] Uniform Probate Code § 3-808.
\item[269] Fenn & Koren supra note 3, at 662.
\item[270] Id.
\end{footnotes}
The provision is substantially the same as its predecessor under the 1973 probate laws, and provides:

1. No claim or demand against the decedent's estate that arose before the death of the decedent, whether due or not, direct or contingent, shall be binding on an estate unless presented:
   a. Within 3 months from the time of the first publication of the notice of administration, even though the personal representative has recognized the claim or demand by paying a part of it.

2. No cause of action shall survive the death of the person against whom the claim may be made, whether an action is pending at the death of the person or not, unless the claim is filed in the manner provided in this part and within the time limited.

3. Nothing in this section affects or prevents:
   a. A proceeding to enforce any lien on property of the decedent.

Although it seems clear that the statute requires the filing of a claim prior to payment, the courts have not strictly enforced this requirement. In *In re Estate of King*, King, the decedent, had entered into an option contract for the sale of certain property. The option to purchase the property was exercisable during a specified period of time after King's death. On the same day as the execution of the option contract, King entered into an agreement with the realtor involved in the transaction. The agreement provided for a total brokerage commission of $100,000 to be paid when the option was exercised. Periodic commission payments were deducted from this fee. Subsequent to King's death, the optionee gave notice of his intention to exercise the option. Thereupon, the co-executors of the estate filed a petition for authority to sell the property and pay the commission. The court granted this petition. Two months later, the co-executors petitioned the court to amend its order by eliminating the authorization of the commission. As grounds for this petition, the co-executors stated that the realtor had not filed his claim for the commission within the statutory time limitation. The trial court granted this petition. The District Court of Appeal, Third District, reversed, holding that the realtor's claim was not the type of contin-

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274. 338 So. 2d 56 (Fla. 3d Dist. 1976).
gent claim barred by the limitation statute. The appellate court did not elaborate on this holding, but relied upon *Denco, Inc. v. Belk.*\(^{273}\) There, the Supreme Court of Florida held that the notice of claim provision did not apply to the exercise of an option in a lease. The supreme court apparently found that the option fell within the exception for liens upon property. By extending this rationale to broker's fees, the *King* court has gone too far. The considerations that support the property exception, where the requisite title examination prior to disposal will reveal any such claims, do not support the exception of broker's fees from the filing of claims requirement. The result reached in *King* is equitable, but a better rationale would have been based upon unjust enrichment or quantum meruit recovery.

Another exception to the mandatory filing requirement was developed in *In re Estate of Shaw.*\(^{276}\) There, prior to Shaw's death, a judgment was entered against him in favor of his creditors. Shaw filed a notice of appeal and, in lieu of supersedeas, deposited negotiable bonds in an escrow account. Shaw died while the appeal was pending. His estate retained Shaw's counsel and pursued the appeal. Counsel for the estate argued that failure to substitute the estate was not fatal to any aspect of the proceedings. The creditors prevailed on appeal, but the negotiable bonds only partially satisfied the judgment. Therefore, the creditors filed in the probate court a motion to aid in the execution of judgment. The probate court denied the motion on the ground that the creditors had failed to file a claim against the estate within the statutory period. The District Court of Appeal, Third District, reversed, holding:

> Through the above acts, the estate made a general appearance and the court acquired jurisdiction. In such cases the necessity of a formal substitution of parties is dispensed with and the appearance is legally conclusive that the estate had notice of the demand sued on well within the [statutory period of limitation].\(^{277}\)

Under the *Shaw* holding, it appears that the notice requirement will be waived whenever the estate appears and participates in pending litigation. The decision is inconsistent with section 733.702(2) of the Florida Statutes (1977). Furthermore, it disregards the rights of interested persons other than the personal representative to object to the claim.\(^{278}\) A more consistent basis for this holding is equitable

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275. 97 So. 2d 261 (Fla. 1957).
276. 340 So. 2d 506 (Fla. 3d Dist. 1976).
277. *Id.* at 507.
estoppel, since the representative lulled the creditors into a sense of
security by filing the affidavit regarding substitution.279

The procedures for the payment of and objection to claims filed
is set forth in section 733.705.280 This statute provides, in part, that
where an objection to a claim is filed, the claimant must bring an
independent action within thirty days from the date of service of the
objection or the claim is barred. The court, however, may extend
this time limit for good cause. Section 733.705 has spawned more
litigation than any other section of the FPC.

One area of confusion has been the applicability of Rule 1.090
of the Florida Rules of Civil Procedure to the thirty day time limit
for filing an independent action. This rule governs the computation
of time in civil actions, and provides in pertinent part:

(a) Computation. In computing any period of time pre-
scribed . . . , the day of the act, event or default from which the
designated period of time begins to run shall not be included. The
last day of the period so computed shall be included unless it is
a Saturday, Sunday or legal holiday in which event the period
shall run until the end of the next day which is neither a Satur-
day, Sunday or legal holiday. When the period of time prescribed
or allowed is less than seven days, intermediate Saturdays, Sun-
days and legal holidays shall be excluded in the computation.

(e) Additional Time After Service by
Mail. When a party
has the right or is required to do some act or take some proceeding
within a prescribed period after the service of a notice or other
paper upon him and the notice or paper is served upon him by
mail, three days shall be added to the prescribed period.281

In Greer v. Estate of Smith,282 the District Court of Appeal,
Fourth District, held that Rule 1.090 was applicable to extend the
period in which to file a complaint, where the objection to the initial
claim was served by mail. The Greer case, however, arose under the
1973 probate laws,283 and the court specifically declined to express
an opinion as to the result under the 1974 FPC.284 The District Court
of Appeal, Third District, however, subsequently reached the same
result under the 1974 FPC in Public Health Trust v. Gavrilove.285
The extension of time for good cause has also been the subject of much litigation. In *In re Estate of Pridgeon*, the claimant filed in the probate court a “petition for payment” of a claim, to which the estate objected, rather than filing a separate action. The trial court granted an extension of time to file the independent action. It found that good cause existed due to confusion generated by the recent transition to the FPC. The District Court of Appeal, First District, affirmed the decision of the trial court. However, a strong dissent by Judge Rawls emphasized that the FPC is even more explicit than the former probate laws in requiring a separate action. Furthermore, even if this were not the situation, ignorance of the law could not constitute good cause as contemplated by the statute.

Good cause was also found in *In re Estate of Herskowitz*. There, the claimant was the former wife of the decedent. She filed a claim, which represented an unpaid special equity adjudged against the decedent as a part of the final judgment of divorce, against the estate. The estate objected to this claim. The claimant did not timely file an independent action and the probate court refused to grant an extension of time. The District Court of Appeal, Third District, reversed, holding that, as a matter of law, the claimant had established good cause for such an extension. The following factors were taken into consideration: (1) the claimant and her children were totally dependent on the decedent; (2) the claimant was forced to move from New York City to Florida to protect her rights after the decedent’s death; (3) the claimant had a succession of short-term attorneys; and (4) the claimant’s conversations with the executor (the decedent’s brother) and a family friend prior to filing the claim led her to believe that the claim would be paid without objections. In addition, the court emphasized:

It is undisputed not only that the executor knew of the hardship to the children and their mother caused by his brother’s death, that he claimed that no funds were available and then conditioned any help upon a payment of the judgment, but also that he further conditioned that payment upon [an illegal] requirement that the claimant was to receive no money for her own use.

286. Fla. Stat. § 733.705(3) (1977). “Good cause” has been defined by the Supreme Court of Florida “as a substantial reason, one that affords a legal excuse,” or a “cause moving the court to its conclusion, not arbitrary or contrary to all the evidence,” and not mere “ignorance of law, hardship on petitioner, and reliance on [another’s] advice.” *In re Goldman’s Estate*, 79 So. 2d 846, 848 (Fla. 1955)(citations omitted).
287. 349 So. 2d 741 (Fla. 1st Dist. 1977).
288. Id. at 742 (Rawls, J., dissenting).
289. 342 So. 2d 530 (Fla. 3d Dist. 1977).
It is further undisputed that the parties were not dealing at arm's length, but in a claimed atmosphere of family concern. 290

The major problem with this opinion is that the court never specifically states why these facts constitute good cause. The opinion appears to be based upon the familial nature of the dispute, but good cause requires more than this. 291 The court hints at seemingly deceptive actions on the part of the executor, yet these actions took place prior to the formal objection by the estate. The court also mentions the claimant's succession of attorneys as a relevant consideration. Perhaps the Herskowitz decision is best explained on the basis that the court is unwilling to hold a lay person to the same strict guidelines that are imposed upon a lawyer. If the claimant in this case has been consistently represented by an attorney, none of the other factors relied upon by the court would be sufficient to constitute good cause.

In contrast to Herskowitz, the District Court of Appeal, Second District, in Exchange National Bank v. Field, 292 held that the probate court abused its discretion in finding good cause for an extension of time. There, notice of the executor's objections to the claims was served upon the claimants on May 20. The executor refused the claimants' request for a settlement on June 17. On July 9, the probate court granted the executor's motion for an extension of time within which to file the inventory of the estate. The inventory was filed on August 29. Three months later, the claimants filed their motion for an extension of time. The claimants contended that they delayed filing suit until they could examine the inventory and determine whether the estate possessed sufficient assets to satisfy the claims. The District Court of Appeal, Second District, held that this did not constitute good cause under the Goldman standard, 293 particularly in view of the three month post-inventory delay.

Aside from the direct effect of an objection, which requires the claimant to file an independent action, there may also be collateral effects that operate to the detriment of the claimant. These collateral effects are illustrated in In re Estate of Shaw. 294 There, Temple Ner Tamid filed a claim to which the estate objected. Thereafter, the Temple filed suit in the civil division of the circuit court. During the pendency of the civil suit, the Temple petitioned the probate court for an accounting of the assets of the estate, and for production

290. Id. at 532.
291. See note 286 supra.
292. 338 So. 2d 859 (Fla. 2d Dist. 1976).
293. See note 286 supra.
294. 340 So. 2d 491 (Fla. 3d Dist. 1976).
of certain documents. The Temple alleged that the personal representative was improperly administering the estate to the detriment of the creditors. The probate court denied the petition on the ground that the Temple was a contingent creditor, and therefore not an interested party who would be entitled to such relief. The District Court of Appeal, Third District, affirmed the decision of the probate court. An important factor in Shaw was the court's belief that the Temple was using the petition in bad faith, as a means of obtaining information that it could not obtain through regular discovery proceedings in the pending civil litigation. The Shaw case should be narrowly interpreted in light of this factor, so that estates will not be permitted to avoid accountability to creditors merely by objecting to their claims.

H. Special Provisions for Distribution

After the claims against the estate are determined, as set forth in part VII of chapter 733, the assets of the estate must be distributed, as provided in part VIII. This part governs the method and order of distribution, as well as the consequences of improper distribution and the apportionment of estate taxes.

The major criticism of this portion of the 1974 FPC was that it lacked statutory coordination in two areas. The first area involved the payment of an encumbrance on specifically devised property. Section 733.803 of the 1974 FPC provided: “Encumbered property; liability for payment.—The specific devisee of encumbered property shall be entitled to have the encumbrance on devised property paid at the expense of the residue of the estate only when the will shows such an intent.” This section was substantially duplicated in section 733.804 of the 1974 FPC, which provided: “Non-exoneration.—A specific devise passes subject to any security interest existing at the date of death, without the rights of exoneration, regardless of a general directive in the will to pay debts.” The 1975 legislature eliminated the redundancy by repealing section 733.804 and incorporating the “general directive” clause into section 733.803.

The other area of confusion in this part concerned the order in
which assets were appropriated for distribution purposes, and abatement and contribution where the assets were insufficient for the full payment of debts, taxes, devises, etc. Under the 1974 FPC, the order of appropriation was governed by section 733.805. The abatement and contribution provision was contained in section 733.807. Early commentators noted that these two provisions were two sides of the same coin and recommended their consolidation. The 1975 legislature followed this recommendation by repealing section 733.807 and incorporating its provisions into section 733.805(2).

I. Closing Estates

Chapter 733, part IX of the Florida Statutes (1977) delineates the procedures that must be followed by the personal representative in distributing the assets and obtaining his discharge. It also provides for subsequent administration in the event that new property of the estate is discovered or other cause is shown for further administration.

The 1977 legislature enacted a minor amendment to section 733.901(1), which governs the contents of the petition for discharge of the personal representative. The amendment eliminates the prior requirement that the petition include the proposed distribution of the assets of the estate, any prior dispositions that have been made, and a statement that objections to the petition or proposed distribution must be filed within thirty days. Although this amendment eliminates some of the formalities required for closing the estate, it is still far from the efficient and informal procedures for accounting and distribution that are advocated by the drafters of the UPC.

This concludes the analysis of the procedures for the formal administration of estates. The remaining two chapters concern situations where an abbreviated procedure may be used.

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303. Id. § 733.807 (repealed 1975).
304. Fenn & Koren, supra note 3, at 668-69.
307. Id. § 733.903.
308. 1977 Fla. Laws, ch. 77-87, § 42 and ch. 77-174 § 1 (amending Fla. Stat. § 733.901(1)(1975)).
309. See Uniform Probate Code § 3-1003 and Comment; Fenn & Koren, supra note 3, at 671.
V. FOREIGN PERSONAL REPRESENTATIVES AND ANCILLARY ADMINISTRATION

The disposition of the Florida assets of a nonresident decedent is governed by chapter 734 of the FPC. Under section 733.702, all claims against both resident and nonresident estates are barred if not filed within three years. Section 733.702 also provides a method by which the representative of a resident decedent's estate can expedite the determination of claims. Under the 1974 FPC, the counterpart to section 733.702 for the estates of nonresident decedents was found in sections 734.103 and 734.104. The 1977 legislature consolidated these provisions and significantly amended the procedures to expedite settlement of such claims. Under the 1974 FPC, unless the will devised real property situated in Florida, only the personal representative could initiate such procedures. The 1977 amendment provides that either the personal representative or any other person may initiate the proceedings. The 1974 FPC provision, however, applied to both testate and intestate estates, whereas the 1977 enactment is limited to testate estates. There appears to be no valid reason to prejudice the estates of intestate decedents in this manner, and the legislature should correct this inequity by inserting the omitted provision.

The actual procedure for settling claims has remained substantially the same under the 1977 amendment. The procedure is initiated by filing a petition requesting the admission of the foreign probated will to record. This petition must be accompanied by authenticated copies of the will, the petition for probate, the order admitting the will to probate, the letters of administration, and that part of the domiciliary record that will show the names of the devisees. The 1977 enactment liberalizes the 1974 FPC provision by providing that under certain circumstances the requirement for these documents may be waived.

310. FLA. STAT. § 733.702(1)(b) (1977).
311. Id. § 733.702(1)(a).
312. FLA. STAT. § 734.103 (1975)(current version at FLA. STAT. § 734.103 (1977)).
313. Id. § 734.104 (current version at FLA. STAT. § 734.103 (1977)).
314. Id.
315. Id. § 734.103(1) (current version at FLA. STAT. § 734.103(1)(1977)).
316. 1977 Fla. Laws, ch. 77-87, § 44 (current version at FLA. STAT. § 734.103(1) (1977)).
319. Id. This statute provides: "If any of the documents required under this subsection are not a part of the domiciliary record, then, on proper proof thereof, the court may waive the requirement for such documents or may require an affidavit of the petitioner reciting the information not disclosed by the domiciliary record."
After the petition is granted, claims are determined in the same manner as claims against a resident decedent’s estate, as specified in chapter 733 of the Florida Statutes (1977).

VI. Family Administration and Small Estates

Chapter 735 of the FPC provides certain estates with an alternative to the expensive and cumbersome administration procedures specified in chapter 733.

Pursuant to chapter 735, part I of the Florida Statutes (1977), certain estates may qualify for family administration. The procedure is designed to effectuate the almost immediate distribution of the assets of the decedent to his family, without the necessity of a personal representative or the delay associated with the various notice and claim procedures required under regular administration.

Under the 1974 FPC, family administration was available where the only heirs or beneficiaries were the decedent’s surviving spouse and lineal descendants. Early commentators criticized this narrow applicability. The 1975 legislature responded to this criticism by extending the availability of family administration to include estates whose heirs and beneficiaries also included lineal descendants, and in the case of testate estates, where specific or general devises constituted only a minor part of the decedent’s estate.

The 1975 legislature, however, limited the operation of the family administration provisions in one respect. This limitation is the requirement that the estate consist solely of personal property. If real property forms part of the estate, administration must proceed under chapter 733 until the claims of creditors have been processed or barred. This prerequisite will cause unnecessary delay and expense. Creditors are adequately protected, even where real property is involved, since the petition for family administration must state that there are no such claims outstanding, and if the petition is erroneous, the petitioners remain liable for such claims until the statute of limitations expires. Section 735.101 should be amended to eliminate the requirement of commencing administration under

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320. See text accompanying notes 271-94 supra.
322. Fenn & Koren, supra note 3, at 687-89.
324. Id.
326. Id. § 735.103(3).
327. Id. § 735.107(3)(d).
chapter 733, especially in cases where there are no claims of creditors outstanding.

The legislature should also amend the limitation which restricts family administration to estates which have a gross value of less than $60,000.328 It has been suggested that this limitation was imposed because estates of greater value are required to file a federal estate tax return, and thus family administration did not provide any real benefit.329 The 1976 Tax Reform Act, however, substantially changed the prior federal law in this regard.330 In 1977, estates of less than $120,000 are not required to file federal estate tax returns.331 This amount will be increased each year until 1981, at which time estates with a value of less than $175,000 will be tax exempt.332 Therefore, the gross value limitation placed upon family administration ought to be changed to accord with the changes in the federal estate tax law.

Upon the probate court’s determination that an estate will qualify under chapter 735, family administration is commenced by the filing of a verified petition by the beneficiaries and surviving spouse of the decedent.333 The petition must contain facts showing that the estate qualifies, a complete list of assets and their estimated value, and a statement that the estate is not indebted or provisions for payment of debts has been made or that the claims are barred. Under the 1974 FPC, the petition also had to set forth a proposed schedule of distribution of assets.334 In 1977, however, the legislature eliminated this requirement.335 Upon filing this petition, the will, if any, is admitted to probate and the assets may be distributed immediately.336

Another alternative to regular administration is the use of summary administration.337 The summary administration procedure, however, may be used only in very limited circumstances. The decedent’s will must not direct administration and the value of the estate subject to administration must not exceed $10,000.338 Early

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328. Id. § 735.101(4).
329. See Fenn & Koren, supra note 3, at 687-89.
331. I.R.C. §§ 2001 & 2010. This amount is based upon the value of an estate which corresponds to the amount of the unified tax credit allowed. Thus, the size of the nontaxable estate is subject to reduction by the amount of any taxable gifts made by the decedent during his lifetime.
332. See note 331 supra.
337. Id. § 735.201-.209.
338. Id. § 335.201.
commentators harshly criticized the summary administration procedures enacted in the 1974 FPC. The criticisms were based upon the omission of many provisions found in the 1973 probate laws, and its internal inconsistencies. In 1975, the legislature corrected most of these deficiencies. Thus, provisions were added to require the petition for summary administration to include a proposed schedule of distribution of all assets of the beneficiaries, to provide that property of the decedent that remains in the hands of the assignee under the order of the probate court continues to be liable to satisfy claims against the decedent until the limitation period expires, and to provide that the petitioners for summary administration remain personally liable for lawful claims against the estate. These provisions afford the creditors of summarily administered estates the same protection that is afforded to the creditors in cases of family administration.

The 1975 legislature also added a provision to protect heirs and devisees omitted from the summary administration process. Under section 735.206(g):

Any heir or devisee of the decedent who was lawfully entitled to share in the estate but who was not included in the order of summary administration and distribution may enforce his rights in appropriate proceedings against those who procured the order and, when successful, shall be awarded reasonable attorney's fees as an element of costs.

There is no time limit prescribed for such an action. The omission of such a provision from the 1974 FPC had been criticized by the early commentators.

The legislature followed another recommendation of the early commentators by abolishing the procedure under which creditors could be barred prior to the three-year statute of limitations. The optional procedure seemed unnecessary due to the infrequency of

343. Id. § 735.206(d).
344. Id. § 735.206(e).
345. See id. §§ 735.107(3)(d)-(f).
348. For a discussion of the ambiguities and problems encountered by omitted heirs under the 1974 FPC, see Fenn & Koren, supra note 3, at 690 n.974.
such creditors and the availability of provisions to bar such claims under regular administration and subsequently proceed with summary administration.\textsuperscript{350}

Under the current FPC, unlike the 1974 FPC, family and summary administration are concise and effective methods for administering small estates.\textsuperscript{351} These procedures will eliminate much of the unnecessary costs attendant upon regular administration and will provide speedy distribution to the heirs and beneficiaries.

\textbf{VII. CONCLUSION}

The current version of the FPC has eliminated many of the difficulties encountered in the 1974 FPC. Most of the significant changes occurred in 1975, prior to the effective date of the FPC. The legislature, however, continued to modify and improve the FPC in 1976 and 1977. Unfortunately, as this article has illustrated, omissions and inconsistencies still plague the FPC and additional revisions are necessary if it is to become a concise and effective tool. As the early commentators noted,\textsuperscript{352} the piecemeal adoption of the UPC has contributed to the confusion, and the legislature should reconsider its previous rejection of UPC provision.

\textsuperscript{350} 1977 Fla. Laws, ch. 77-87, § 47.

\textsuperscript{351} Chapter 735 also permits disposition of personal property without administration in certain cases. \textit{Fla. Stat.} §§ 735.301-.302 (1977). Since there have been no significant changes in either provision since the enactment of the 1974 FPC, discussion of this procedure has been omitted from this article.

\textsuperscript{352} Fenn & Koren, \textit{supra} note 3, \textit{passim}. 