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# Judiciary Committee

Thursday, January 28, 2016  
9:00 a.m. – 12:00 p.m.  
Sumner Hall (404 HOB)

**MEETING PACKET**

Steve Crisafulli  
Speaker

Charles McBurney  
Chair

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

### Judiciary Committee

**Start Date and Time:** Thursday, January 28, 2016 09:00 am  
**End Date and Time:** Thursday, January 28, 2016 12:00 pm  
**Location:** Sumner Hall (404 HOB)  
**Duration:** 3.00 hrs

**Consideration of the following bill(s):**

HB 43 Churches or Religious Organizations by Plakon, Cortes, B.  
HB 111 Jury Service by Combee  
CS/CS/HB 163 Weapons and Firearms by Justice Appropriations Subcommittee, Criminal Justice Subcommittee, Gaetz  
CS/HB 257 Terroristic Threats by Criminal Justice Subcommittee, Smith  
CS/CS/HB 393 Estates by Insurance & Banking Subcommittee, Civil Justice Subcommittee, Berman  
HB 747 Digital Assets by Fant

**Consideration of the following proposed committee bill(s):**

PCB JDC 16-01 -- Juror Costs

NOTICE FINALIZED on 01/26/2016 4:06PM by Ingram.Michele



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 43 Churches or Religious Organizations

**SPONSOR(S):** Plakon; Cortes, B. and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 110

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 4 N	Malcolm	Bond
2) Judiciary Committee		Malcolm	Havlicak RH

### SUMMARY ANALYSIS

Conscience protection laws prevent individuals and entities from being required to perform services that violate their religious beliefs or moral convictions. These laws have historically applied to abortion, sterilization, and contraception. The bill creates conscience protections for clergy, churches, and religious organizations and their employees who object to solemnizing any marriage or providing services, facilities, or goods related to a marriage if doing so violates the organization or individual's sincerely held religious beliefs.

The bill also protects the state tax exempt status, and the right to apply for grants, contracts, and participation in government programs, of covered organizations that refuse to solemnize a marriage or provide services, facilities, or goods related to a marriage.

The bill does not have a fiscal impact on state or local government.

The bill provides an effective date of July 1, 2016.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Conscience Clauses

Conscience clauses allow individuals and entities to refuse to provide a service or undertake an activity that violates his or her religious or moral beliefs. A number of states and the federal government have enacted conscience clauses on a wide array of issues, including abortion,<sup>1</sup> the draft,<sup>2</sup> birth control,<sup>3</sup> education,<sup>4</sup> and adoption.<sup>5</sup> Florida currently provides conscience clause protections for physicians and hospitals that refuse to perform abortions or dispense contraceptives, family planning devices, services or information for medical or religious reasons.<sup>6</sup> In June of 2015, Texas enacted conscience clause protections for clergy and religious organizations and their employees regarding marriage services identical to this bill.<sup>7</sup>

##### Free Exercise Clause

The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>8</sup> Prior to 1990, the United States Supreme Court, in determining the constitutionality of laws that infringe upon the free exercise clause of First Amendment to the United State Constitution, "used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest."<sup>9</sup> Using this test, the Court has held that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits,<sup>10</sup> and that Amish children could not be required to comply with a state law demanding that they remain in school until the age of 16 where their religion required them to focus on Amish values and beliefs during their adolescent years.<sup>11</sup>

However, in 1990, the Court in *Employment Div., Dept. of Human Resources of Ore. v. Smith* rejected the compelling interest test.<sup>12</sup> *Smith* concerned two members of the Native American Church who were fired for ingesting peyote for religious purposes. When they sought unemployment benefits, Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the compelling interest test, held that the denial of benefits violated the free exercise clause.<sup>13</sup> The United States Supreme Court reversed. It found that the "use of the [compelling interest] test whenever a person objected on religious grounds to the enforcement of a generally applicable law 'would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.'"<sup>14</sup> The Court abandoned the compelling interest test in favor of a bright-

<sup>1</sup> 42 U.S.C. § 300a-7 (2000).

<sup>2</sup> 50 U.S.C. app. § 456(j) (2010).

<sup>3</sup> COLO. REV. STAT. 25-6-102(9) (2015).

<sup>4</sup> MO. CONST. art. I, § 5; N.H. REV. STAT. ANN. § 186:11 (2015).

<sup>5</sup> VA. CODE ANN. § 63.2-1709.3(A) (2012); N.D. CENT. CODE § 50-12-07.1.

<sup>6</sup> ss. 381.0051(5) and 390.0111(8), F.S.

<sup>7</sup> 2015 TEX. GEN. LAWS ch. 434.

<sup>8</sup> Article 1, section 3 of the Florida Constitution contains a nearly identical provision ("There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof . . . .").

<sup>9</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760-61 (2014).

<sup>10</sup> *Sherbert v. Verner*, 374 U.S. 398, at 408-09 (1963).

<sup>11</sup> *Wisconsin v. Yoder*, 406 U.S. 205, at 210-11, 234-36 (1972).

<sup>12</sup> 494 U.S. 872, 875 (1990). The "compelling interest test" is also called the "balancing test." See *id.* at 875.

<sup>13</sup> *Id.* at 875.

<sup>14</sup> *Burwell*, 134 S. Ct. at 2760-61 (quoting *Smith*, 494 U.S. at 888).

line test in which, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."<sup>15</sup>

### **Religious Freedom and Restoration Act**

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA) to provide religious liberty protections broader than those in *Smith*.<sup>16</sup> The RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."<sup>17</sup> If the government substantially burdens a person's exercise of religion, that person is entitled to an exemption from the rule unless the government "demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest."<sup>18</sup> In its original form, the RFRA applied to both the federal government and the states; however, the Supreme Court in *City of Boerne v. Flores* ruled the RFRA's application to the states unconstitutional because "[t]he stringent test RFRA demands . . . far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."<sup>19</sup>

In 1998, in response to *Flores*, the Florida legislature enacted a state version of the RFRA that is similar in substance to the federal RFRA.<sup>20</sup> The Florida RFRA (FRFRA), ch. 761, F.S., provides that the government<sup>21</sup> may not substantially burden a person's exercise of religion<sup>22</sup>, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.<sup>23</sup>

In interpreting the FRFRA, the Florida Supreme Court has held that "a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires."<sup>24</sup> According to the Court, laws that merely inconvenience the exercise of religion do not create a substantial burden.<sup>25</sup> Although the FRFRA prohibits a court from conducting a factual inquiry into the validity of a person's beliefs, the court will examine the relationship between the person's religious exercise and the level of government interference to determine whether the interference is a substantial burden or merely inconveniences the exercise of religion.<sup>26</sup>

### **Ministerial Exception**

In 2012, the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* unanimously rejected application of its free exercise clause analysis from *Smith*<sup>27</sup> instead

<sup>15</sup> *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997).

<sup>16</sup> See 42 U.S.C. § 2000bb(a)(2).

<sup>17</sup> 42 U.S.C. § 2000bb-1(a).

<sup>18</sup> 42 U.S.C. § 2000bb-1(b).

<sup>19</sup> 512 U.S. 507, 533-34 (1997).

<sup>20</sup> A number of states have also enacted state versions of the RFRA. See National Conference of State Legislatures, *State Religious Freedom Restoration Acts*, <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> (last visited Sept. 9, 2015).

<sup>21</sup> "Government" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state. s. 761.02(1), F.S.

<sup>22</sup> "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief. s. 761.02(3), F.S.

<sup>23</sup> s. 761.03, F.S.

<sup>24</sup> *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004)

<sup>25</sup> *Id.* at 1035.

<sup>26</sup> See *id.* (finding that Boca Raton's grave marker regulations did not substantially burden the appellant's religious beliefs because they "merely inconvenience the plaintiffs' practices of marking graves and decorating them with religious symbols.") (quoting *Warner*, F. Supp. 2d 1272, 1287 (S.D. Fla. 1999)).

<sup>27</sup> 494 U.S. 872.

recognizing a “ministerial exception,” grounded in the First Amendment, that precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers.”<sup>28</sup> Observing that “members of a religious group put their faith in the hands of their ministers,” the Court reasoned that applying employment discrimination in the context of religious institutions to require “a church to accept or retain an unwanted minister, or [punish] a church for failing to do so, intrudes upon more than a mere employment decision.”<sup>29</sup> Such action, the Court concluded,

interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.<sup>30</sup>

### **Right to Marriage and *Obergefell***

The United State Supreme Court has consistently held that marriage is a fundamental right under the due process clause of the Fourteenth Amendment.<sup>31</sup> In June 2015, the Supreme Court in *Obergefell v. Hodges* extended the right to marriage to same-sex couples finding that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”<sup>32</sup>

### **Effect of Proposed Changes**

The bill creates s. 761.061(1), F.S., to provide that a clergy member, minister, church, religious organization, or any organization supervised or controlled by or in connection with a church or religious organization may not be required to solemnize any marriage or provide services, facilities, or goods related to the marriage if such action would cause the clergy member, minister, church or organization to violate a sincerely held religious belief. These provisions extend to any individual employed by a church or religious organization while acting in the scope of his or her employment.

The bill also provides that a refusal to solemnize any marriage or provide services, facilities, or goods related to the marriage pursuant to s. 761.061(1), F.S., may not serve as the basis for any cause of action or any other action by this state or any political subdivision to penalize or withhold benefits or privileges, including tax exemptions, governmental contracts, grants, or licenses.

The bill provides an effective date of July 1, 2016.

#### **B. SECTION DIRECTORY:**

Section 1 creates s. 761.061, F.S., related to the rights of churches and religious organizations or individuals.

Section 2 provides for an effective date of July 1, 2016.

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<sup>28</sup> 132 S. Ct. 694, 705 (2012). See 42 U.S.C. s. 2000e-1 (providing an exemption for religious organizations and institutions from religious discrimination from the Civil Rights Act of 1964 related to employment discrimination).

<sup>29</sup> *Hosanna-Tabor*, 132 S. Ct. at 706.

<sup>30</sup> *Id.*

<sup>31</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598; see, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639-40, (1974); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

<sup>32</sup> 135 S. Ct. 2584, 2604 (2016).

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### 2. Other:

The bill appears to implicate separate constitutional provisions: the free exercise clause, and the due process and equal protection clauses.

#### Free Exercise Clause

The First Amendment to the United States Constitution provides, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Likewise, Article 1, Section 3 of the Florida Constitution provides that "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof . . . ."

As discussed above, with respect to internal decisions of religious institutions, the Supreme Court has recognized a "ministerial exemption" under the First Amendment to the United States Constitution. However, that exemption has only been applied by the Supreme Court in employment discrimination cases.



In addition to these constitutional protections, as discussed above, Florida's Religious Freedom Restoration Act (FRFRA) guarantees that "The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability . . . ."33

It may be argued that the language of this bill does not create a new right for churches, religious organizations, and their employees but rather codifies an existing right guaranteed by both the United States and Florida Constitutions and the FRFRA—the right to be free from the government compelling them, as clergy and religious organizations, to engage in conduct their religion forbids.

#### Due Process and Equal Protection

The due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution provide that "no state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."<sup>34</sup> Similarly, Florida's equal protection clause states that "no person shall be deprived of any right because of race, religion, national origin, or physical disability,"<sup>35</sup> and the state's due process clause provides that "no person shall be deprived of life liberty or property without due process of law."<sup>36</sup>

A court's analysis of an equal protection or substantive due process claim depends on the nature of the right and the classification of people involved. A court will analyze government action that infringes a fundamental right or discriminates according to race, ethnicity, religion, and national origin with the strictest scrutiny.<sup>37</sup> To survive a constitutional challenge under strict scrutiny, the government must show that the regulation is the least restrictive means necessary to further a compelling state interest.<sup>38</sup> In addition to already recognized protected classes, federal and state courts also recognize quasi-suspect classes.<sup>39</sup> If a claim does not involve a fundamental right, a suspect class, or quasi-suspect class, then a court will uphold the law if it bears a reasonable relationship to the attainment of a legitimate government objective.<sup>40</sup>

Although the United State Supreme Court in *Obergefell* held that the due process and equal protection clauses of the Fourteenth Amendment provide the right to same-sex marriage, the Court did not indicate the standard of review it would apply in determining the constitutionality of state action that may infringe this right nor did it indicate whether an individual's sexual orientation is a protected class.

However, the United States Supreme Court has a history of disfavoring private-party discrimination and, instead, finding that state action may unconstitutionally facilitate private parties' discrimination against a protected class.<sup>41</sup> For example, in *Shelley v. Kraemer*, the Supreme Court found that judicial enforcement of racially restrictive covenants in private neighborhoods was sufficient to give

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<sup>33</sup> s. 761.03(1), F.S.

<sup>34</sup> U.S. CONST. amend. XIV, s. 1.

<sup>35</sup> FLA. CONST. art. I, s. 2.

<sup>36</sup> *Id.* at art. I, s. 9.

<sup>37</sup> See, e.g., *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Skinner*, 316 U.S. 535 (1942).

<sup>38</sup> See *Roe*, 410 U.S. at 155.

<sup>39</sup> BLACK'S LAW DICTIONARY (10th ed. 2014) defines quasi-suspect classification as "[a] statutory classification based on gender or legitimacy, and therefore subject to intermediate scrutiny under equal protection analysis." BLACK'S defines intermediate scrutiny as "[a] standard lying between the extremes of rational-basis review and strict scrutiny. Under the standard, if a statute contains a quasi-suspect classification (such as gender or legitimacy), the classification must be substantially related to the achievement of an important governmental objective."

<sup>40</sup> *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

<sup>41</sup> *Reitman v. Mulkey*, 387 U.S. 369, 375 (1967) (reasoning that "'(t)he instant case presents an undeniably analogous situation' wherein the State had taken affirmative action designed to make private discriminations legally possible."); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 717 (1961) (finding that discrimination by a lessee of an agency created by the State was sufficient to find that there was "discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment.").

rise to state action that promoted discrimination and thus was in violation of the Fourteenth Amendment.<sup>42</sup>

In recent years, some courts have begun recognizing homosexuals as a quasi-suspect class and applying intermediate scrutiny to find laws with discriminatory effects against homosexuals unconstitutional.<sup>43</sup> Further, some courts, including a Florida state court, have found that laws prohibiting qualified homosexuals from participating in state-sanctioned activity, like adoption, that qualified heterosexuals can participate in freely are not justifiable even under the deferential rational basis review and are unconstitutional.<sup>44</sup> However, in 2004, the Eleventh Circuit Court of Appeals held that Florida's law prohibiting homosexuals from adopting did not burden a fundamental right and withstood rational basis scrutiny.<sup>45</sup> This case remains good law<sup>46</sup> and established federal precedent that, under Florida law, homosexuals are not a suspect or quasi-suspect class.

On the other hand, the Supreme Court in *Obergefell*

emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.<sup>47</sup>

It is unclear how a court would analyze a challenge to the bill in light of the constitutional provisions and case law provided above. To date, there does not appear to be any precedent directly concerning a conflict between these constitutional rights and how such conflict would be resolved.

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear what entity would qualify as "an organization . . . in connection with a church or religious organization" or how such an organization is different than an "organization supervised or controlled by . . . a church or religious organization."

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

<sup>42</sup> *Shelley v. Kraemer*, 334 U.S. 1, 21 (1948).

<sup>43</sup> See *Windsor v. U.S.*, 699 F. 3d 169, 181-82 (2d Cir. 2012), *aff'd on other grounds*, 133 S.Ct. 2675 (2013); *Golinski v. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 985-86 (N.D. Cal. 2012).

<sup>44</sup> *Florida Dept. of Children and Families v. Adoption of X.X.G.*, 45 So. 3d 79, 86 (Fla. 3d DCA 2010); *Bassett v. Snyder*, 2014 WL 5847607 (E.D. Mich. 2014). BLACK'S LAW DICTIONARY (10<sup>th</sup> ed. 2014) defines the "rational-basis test" as "[t]he criterion for judicial analysis of a statute that does not implicate a fundamental right or a suspect or quasi-suspect classification under the Due Process or Equal Protection Clause, whereby the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective. Rational basis is the most deferential of the standards of review that courts use in due-process and equal-protection analysis."

<sup>45</sup> *Lofton v. Secretary of Dept. of Children and Family Services*, 358 F.3d 804, 818 (11th Cir. 2004).

<sup>46</sup> The Supreme Court denied certiorari on January 10, 2005. See *Lofton v. Secretary, Florida Dept. of Children and Families*, 543 U.S. 1081 (2005).

<sup>47</sup> *Obergefell*, 135 S.Ct. at 2607.

1                                   A bill to be entitled  
 2       An act relating to churches or religious  
 3       organizations; creating s. 761.061, F.S.; providing  
 4       that churches or religious organizations, related  
 5       organizations, or certain individuals may not be  
 6       required to solemnize any marriage or provide  
 7       services, accommodations, facilities, goods, or  
 8       privileges for related purposes if such action would  
 9       violate a sincerely held religious belief; prohibiting  
 10      certain legal actions, penalties, or governmental  
 11      sanctions against such individuals or entities;  
 12      providing an effective date.

13  
 14 Be It Enacted by the Legislature of the State of Florida:

15  
 16       Section 1. Section 761.061, Florida Statutes, is created  
 17 to read:

18       761.061 Rights of certain churches or religious  
 19 organizations or individuals.-

20       (1) A church or religious organization, an organization  
 21 supervised or controlled by or in connection with a church or  
 22 religious organization, an individual employed by a church or  
 23 religious organization while acting in the scope of that  
 24 employment, or a clergy member or minister may not be required  
 25 to solemnize any marriage or provide services, accommodations,  
 26 facilities, goods, or privileges for a purpose related to the

27 solemnization, formation, or celebration of any marriage if such  
28 an action would cause the church, organization, or individual to  
29 violate a sincerely held religious belief of the entity or  
30 individual.



31 (2) A refusal to solemnize any marriage or provide  
32 services, accommodations, facilities, goods, or privileges under  
33 subsection (1) may not serve as the basis for a civil or  
34 criminal cause of action or any other action by this state or a  
35 political subdivision of this state to penalize or withhold  
36 benefits or privileges, including tax exemptions or governmental  
37 contracts, grants, or licenses, from any entity or individual  
38 protected under subsection (1).

39 Section 2. This act shall take effect July 1, 2016.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 111 Jury Service  
**SPONSOR(S):** Combee and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 206

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	King	Bond
2) Judiciary Committee		King 	Havlicak 

### SUMMARY ANALYSIS

Clerks of the Court randomly select citizens to serve in a jury venire. Current law provides numerous grounds by which individuals called for jury duty can be exempt or excused from service.

This bill adds that individuals permanently incapable of caring for themselves can request a permanent exemption from jury duty by submitting a written statement from a doctor verifying the disability.

The bill does not appear to have a fiscal impact on state or local government.

The bill takes effect July 1, 2016.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

The County Clerks of Court select jury venires at random from a list provided to them by the Florida Department of Highway Safety and Motor Vehicles.<sup>1</sup> The list contains individuals who are legal residents of the county and possess either a valid Driver's License or Identification Card.<sup>2</sup> If an individual wishes to serve but is not on the list, that person can submit an affidavit to that effect and be added to the list of potential jurors.<sup>3</sup> An individual can be exempt, disqualified, or excused from jury service for a number of reasons.<sup>4</sup> Disqualified individuals cannot be selected for jury duty even if they wish to serve. They include:

- An individual who is currently being prosecuted for certain crimes.<sup>5</sup>
- An individual who is a convicted felon, unless they are restored to civil rights.<sup>6</sup>
- The Governor, Lieutenant Governor, a Cabinet officer, a clerk of court, and judges.<sup>7</sup>
- An individual who has an interest in the case.<sup>8</sup>

Individuals who have served in the past twelve months are exempt.<sup>9</sup>

Individuals who *must* be excused include:

- A person 70 years of age or older.<sup>10</sup>
- An expectant mother or parent who is not employed full time and who has custody of a child under 6 years of age.<sup>11</sup>
- A person who is responsible for the care of a person who, because of mental illness, intellectual disability, senility, or other physical or mental incapacity, is incapable of caring for himself or herself.<sup>12</sup>
- Full-time law enforcement officers.<sup>13</sup>

Persons who *may* be excused include:

- A practicing attorney, physician, or a person who is physically infirm.<sup>14</sup>
- A person showing hardship, extreme inconvenience, or public necessity.<sup>15</sup>

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<sup>1</sup> ss. 40.02(1), 40.011(2), F.S.

<sup>2</sup> *Id.*

<sup>3</sup> s. 40.011(3), F.S.

<sup>4</sup> s. 40.013, F.S.

<sup>5</sup> s. 40.013(1), F.S.

<sup>6</sup> *Id.*

<sup>7</sup> s. 40.013(2)(a), F.S.

<sup>8</sup> s. 40.013(3), F.S.

<sup>9</sup> s. 40.013(7), F.S.

<sup>10</sup> s. 40.013(8), F.S.

<sup>11</sup> s. 40.013(4), F.S.

<sup>12</sup> s. 40.013(9), F.S.

<sup>13</sup> s. 40.013(2)(b), F.S.

<sup>14</sup> s. 40.013(5), F.S.

<sup>15</sup> s. 40.013(6), F.S.

Currently, only individuals 70 years of age or older can request to be permanently excused.<sup>16</sup> The request must be in writing.<sup>17</sup> Individuals who are permanently excused can also request to be added back into the jury pool as long as they are otherwise qualified.<sup>18</sup>

#### Effect of Proposed Changes

This bill creates a new exception that allows those who are permanently incapable of caring for themselves due to "mental illness, intellectual disability, senility, or other physical or mental incapacity" to be permanently excused. Such a person can apply to the clerk<sup>19</sup> for the exemption by submitting a letter from a physician verifying the permanent incapability.

#### B. SECTION DIRECTORY:

Section 1 amends s. 40.013, F.S., regarding jury service.

Section 2 provides an effective date of July 1, 2016.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

#### D. FISCAL COMMENTS:

None.

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<sup>16</sup> s. 40.013(8), F.S.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *see* s. 40.001, F.S.



### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The language of the bill provides that a person *may* be permanently excused upon request. This gives the Clerk the discretion in making the ultimate decision. Compare this bill with the language in s. 40.013(8), F.S., which provides that an individual 70 years of age or older *shall* be permanently excused upon request.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

1                                   A bill to be entitled  
 2       An act relating to jury service; amending s. 40.013,  
 3       F.S.; providing that certain persons incapable of  
 4       caring for themselves may be permanently excluded from  
 5       jury service upon request; providing requirements for  
 6       such a request; providing an effective date.

7  
 8   Be It Enacted by the Legislature of the State of Florida:

9  
 10       Section 1. Subsection (9) of section 40.013, Florida  
 11       Statutes, is renumbered as subsection (10), and a new subsection  
 12       (9) is added to that section to read:

13           40.013 Persons disqualified or excused from jury service.-  
 14           (9) Any person who, because of mental illness,  
 15           intellectual disability, senility, or other physical or mental  
 16           incapacity, is permanently incapable of caring for himself or  
 17           herself may be permanently excused from jury service upon  
 18           request if the request is accompanied by a written statement to  
 19           that effect from a physician licensed pursuant to chapter 458 or  
 20           chapter 459.

21       Section 2. This act shall take effect July 1, 2016.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 163 Weapons and Firearms

**SPONSOR(S):** Justice Appropriations Subcommittee; Criminal Justice Subcommittee; Gaetz and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 300

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	8 Y, 4 N, As CS	White	White
2) Justice Appropriations Subcommittee	7 Y, 6 N, As CS	McAuliffe	Lloyd
3) Judiciary Committee		White TW	Havlicak RH

### SUMMARY ANALYSIS

Currently, Florida law generally prohibits the open carrying of firearms and certain weapons. Under s. 790.053, F.S., it is a second degree misdemeanor for a person to openly carry on or about his or her person any firearm or electric weapon or device. The bill amends this provision to authorize concealed carry licensees to openly carry firearms or weapons.

Section 790.02, F.S., currently authorizes an officer to make a warrantless arrest for the carrying of a concealed weapon in violation of s. 790.01, F.S., when the officer has reasonable grounds or probable cause to believe such offense has been committed. The bill amends this provision to clarify that it only applies to the unlicensed carrying of a concealed weapon and to delete authorization for such warrantless arrests based on reasonable grounds.

The bill creates s. 776.00111, F.S., and amends s. 790.25(4), F.S., to require the judiciary to employ strict scrutiny in reviewing any statute that implicates the right to bear arms or defend one's self. The bill also specifies that the right to bear arms or defend one's self is a fundamental and individual right that exists in any place that a person has the right to be, subject only to exceptionally and narrowly tailored restrictions that employ the least possible restriction on the right in order to achieve a compelling government interest.

The bill also creates s. 790.0015, F.S., to specify that it is a violation subject to liability for any person or entity to infringe on certain rights to bear arms or defend one's self. With respect to this liability, the bill states, "Notwithstanding any other provision of law, no immunity applies to such a public entity or person acting on behalf of such public entity, infringing on such rights in violation of this section." The section also provides that the rights of an owner or lessee of real property or a private employer are not diminished and they may prohibit the possession of a firearm on their property.

The bill creates s. 790.0016, F.S., to provide that no employee will have a cause of action against an employer, including termination of employment, resulting from failure of the employee to comply with the employer's orders regarding the carrying or not carrying of a weapon during working hours.

Finally, the bill amends s. 790.25(1), F.S., to specify that the Legislature finds that the possession and carrying of weapons and firearms by law-abiding individuals for lawful purposes, including self-defense, enhances public safety.

The Criminal Justice Impact Conference met on October 28, 2015, and determined that the impact of this bill on Department of Correction's prison beds is indeterminate but will likely decrease prison beds. The bill may have an indeterminate fiscal impact on state and local governments and the private sector. (See Fiscal Impact Statement)

The bill takes effect upon becoming a law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0163d.JDC.DOCX

DATE: 1/26/2016

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Right to Bear Arms for Self-Defense, State Regulation, and Judicial Review

The Second Amendment of the U.S. Constitution states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>1</sup> With respect to this provision, the U.S. Supreme Court has stated that the amendment guarantees "the individual right to possess and carry weapons in case of confrontation."<sup>2</sup> According to the Fourth District Court of Appeals, the amendment encompasses the right to carry a gun both inside and outside the home for self-defense.<sup>3</sup>

Article I, section 8(a) of the Florida Constitution states, "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." Regarding this provision, the Florida Supreme Court has stated, "Although [sic] the Legislature may not entirely prohibit the right of the people to keep and bear arms, it can determine that certain arms or weapons may not be kept or borne by the citizen. We have specifically held that the Legislature can regulate the use and the manner of bearing certain specific weapons."<sup>4</sup>

Regulations regarding the bearing of weapons and firearms in Florida have been adopted by the Legislature in ch. 790, F.S., entitled "Weapons and Firearms" and regulations regarding self-defense have been adopted by the Legislature in ch. 776, F.S., entitled "Justifiable Use of Force."

With respect to judicial review of the constitutionality of Florida's regulations relating to the right to bear arms for self-defense, the Fourth District Court of Appeals in *Norman v. State*, recently held that intermediate, rather than strict, scrutiny is the applicable standard for regulations that do not "destroy the core right of self-defense enshrined in the Second Amendment."<sup>5</sup> Intermediate scrutiny "require[s] (1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective," whereas "strict scrutiny 'requires the Government to prove that [a challenged law] 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"<sup>6</sup>

Under the intermediate scrutiny standard, the Court upheld the constitutionality of s. 790.053, F.S., which prohibits the open carrying of certain firearms and weapons, agreeing with the state's assertion that it had a paramount interest in public safety which was furthered by the ban on open carry and finding that a reasonable fit existed between the challenged law and the state's asserted objectives.<sup>7</sup>

In at least three other states, strict scrutiny requirements for the review of restrictions on the right to bear arms have recently been adopted as constitutional amendments:

- Article 1, section 11 of the Louisiana Constitution, now provides after the amendment approved November 6, 2012, "The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny."<sup>8</sup>

<sup>1</sup> U.S. Const. Amend. II.

<sup>2</sup> *Dist. of Columbia v. Heller (Heller I)*, 554 U.S. 570, 592 (2008).

<sup>3</sup> *Norman v. State*, 159 So.3d 205, 212 (Fla. 4<sup>th</sup> DCA 2015) rev. pending, no. SC15-650.

<sup>4</sup> *Rinzler v. Carson*, 262 So.2d 661, 665 (Fla. 1972).

<sup>5</sup> *Norman*, 159 So.3d at 220-22.

<sup>6</sup> *Id.* at 220.

<sup>7</sup> *Id.* at 222-24.

<sup>8</sup> Since the adoption of this amendment, several lower courts have held unconstitutional certain Louisiana statutes that prohibit minors and felons from possessing firearms under the strict scrutiny standard. Each of these rulings has been reversed by a superior Louisiana

- Article 1, section 23 of the Missouri Constitution (emphasis added), now provides after the amendment approved August 5, 2014, "That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. *Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement.* Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity."<sup>9</sup>
- Article I, section 26(a) of the Alabama Constitution, now provides after the amendment approved November 4, 2014, "Every citizen has a fundamental right to bear arms in defense of himself or herself and the state. Any restriction on this right shall be subject to strict scrutiny."<sup>10</sup>

### Legislative Preemption of Firearm Regulation

In s. 790.33(1), F.S., the Florida Legislature has preempted "the whole field of regulation of firearms<sup>11</sup> and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof." Local government authority to regulate firearms and ammunition is prohibited, "except as otherwise expressly provided by the State Constitution or general law...."<sup>12, 13</sup>

Section 790.33(3), F.S., specifies that any person, county, agency, municipality, district, or other entity that violates the preemption by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field is subject to the following liability:

- The court is required to declare the improper ordinance, regulation, or rule invalid and issue a permanent injunction against the local government prohibiting it from enforcing such ordinance, regulation, or rule. Acting in good faith or upon advice of counsel is not a defense.
- If the court determines that a violation was knowing and willful, the court must assess a civil fine of up to \$5,000 against the elected or appointed local government official or officials or administrative agency head under whose jurisdiction the violation occurred. Additionally, a knowing and willful violation by a person acting in an official capacity for any entity that commits a violation is cause for termination of employment or contract or removal from office by the Governor.
- A county, agency, municipality, district, or other entity is liable to a prevailing plaintiff for actual damages, up to \$100,000, and attorney fees and costs, including a contingency fee multiplier, if the plaintiff is found to have been adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of the preemption.

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appellate court. *See, e.g., State v. Draughter*, 130 So.3d 855 (La. 2013); *State of Louisiana in the Interest of J.M.*, 144 So.3d 853 (La. 2014); *State v. Eberhardt*, 145 So.3d 377 (La. 2014); and *State v. Dixon*, 146 So.3d 662 (La.App. 4<sup>th</sup> Cir. 2014). In other cases, both the lower courts and appellate courts rejected arguments that certain gun regulation statutes are unconstitutional under strict scrutiny review. *See, e.g., State v. Zeno*, 155 So.3d 4 (La.App. 1<sup>st</sup> Cir. 2014); and *State in Interest of D.V.*, 144 So.3d 1097 (La.App. 4<sup>th</sup> Cir. 2014).

<sup>9</sup> The Missouri Supreme Court recently held that the right to bear arms is a fundamental right and that any law restricting such right is subject to strict scrutiny regardless of whether the pre-amended or amended version of Missouri's Constitution applies. *Missouri v. Merritt*, No. SC 94096, 2015 WL 4929765, at \*3-4 (August 18, 2015).

<sup>10</sup> There does not appear to be any case law in Alabama discussing the 2014 constitutional amendment.

<sup>11</sup> Section 790.001(6), F.S., defines the term "firearm" as "any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term 'firearm' does not include an antique firearm unless the antique firearm is used in the commission of a crime."

<sup>12</sup> s. 790.33(1), F.S.

<sup>13</sup> The Legislature has expressly authorized local government regulation of the location and construction of a sport shooting range. s. 823.16(7), F.S.

Unless required by applicable law, public funds may not be used to defend or reimburse the unlawful conduct of any person found to have knowingly and willfully committed a violation.<sup>14</sup>

Section 790.33(4), F.S., states that the section does not prohibit:

- Certain zoning ordinances that encompass firearms businesses along with other businesses.
- A law enforcement agency from enacting and enforcing regulations pertaining to firearms, ammunition, or firearm accessories issued to or used by peace officers in the course of their official duties.
- Any entity subject to the section from regulating or prohibiting the carrying of firearms and ammunition by an employee of the entity during and in the course of the employee's official duties, except as provided in s. 790.251, F.S., relating to the protection of the right to keep and bear arms in motor vehicles for self-defense and other lawful purposes.
- A court or administrative law judge from hearing and resolving any case or controversy or issuing any opinion or order on a matter within the jurisdiction of that court or judge.
- The Florida Fish and Wildlife Conservation Commission from regulating the use of firearms or ammunition as a method of taking wildlife and regulating the shooting ranges managed by the commission.

#### Florida's Regulations Relating to the Open and Concealed Carry of Weapons and Firearms

Generally, in Florida, an individual is authorized to own, possess, and lawfully use a firearm and other weapon<sup>15</sup> without a license if the individual is not statutorily prohibited from possessing a firearm or weapon<sup>16</sup> and such possession and use occurs in a lawful manner and location.<sup>17</sup>

*Open Carry:* Florida law prohibits the open carrying of firearms and certain weapons unless an exemption applies. Specifically, s. 790.053, F.S., makes it a second degree misdemeanor<sup>18</sup> for a person to openly carry on or about his or her person any firearm or electric weapon or device. This section does not apply to a person who has a license to carry concealed weapons or concealed firearms<sup>19</sup> if the licensee briefly and openly displays the firearm to the ordinary sight of another person, unless "the firearm is intentionally displayed in an angry or threatening manner, not in necessary self-defense."<sup>20, 21</sup>

*Concealed Carry:* In order to lawfully carry a concealed weapon or concealed firearm, a person, unless exempted, must obtain a license from the Department of Agriculture and Consumer Services.<sup>22</sup> If a person is unlicensed, s. 790.01, F.S., specifies that it is a:

- A first degree misdemeanor<sup>23</sup> for the person to carry a concealed weapon<sup>24</sup> or electric weapon or device<sup>25</sup> on or about his or her person.<sup>26</sup>

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<sup>14</sup> s. 790.33(3), F.S.

<sup>15</sup> Section 790.001(13), F.S., defines "weapon" as "any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife, plastic knife, or blunt-bladed table knife."

<sup>16</sup> There are numerous prohibitions in statute specifying individuals who may not lawfully possess a gun. *See, e.g.,* ss. 790.22 and 790.23, F.S., (prohibiting the possession of firearms and certain weapons by minors, convicted felons, and delinquents, except under specified circumstances).

<sup>17</sup> *See* s. 790.25, F.S.

<sup>18</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. ss. 775.082 and 775.083, F.S.

<sup>19</sup> The term "concealed weapons or concealed firearms" is defined as "a handgun, electronic weapon or device, tear gas gun, knife, or billie, but the term does not include a machine gun ...." s. 790.06(1), F.S.

<sup>20</sup> s. 790.053(1), F.S.

<sup>21</sup> Section 790.053(2), F.S., also specifies that a person may openly carry for purposes of lawful self-defense a self-defense chemical spray and a nonlethal stun gun or dart-firing stun gun or other nonlethal electric weapon or device that is designed solely for defensive purposes.

<sup>22</sup> s. 790.06, F.S.

<sup>23</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. ss. 775.082 and 775.083, F.S.

- A third degree felony<sup>27</sup> to carry a concealed firearm.<sup>28, 29</sup>

These prohibitions do not apply to:

- A person who carries a concealed weapon, or a person who may lawfully possess a firearm and who carries a concealed firearm, on or about his or her person while in the act of evacuating during certain mandatory evacuation orders.
- A person who carries for purposes of lawful self-defense in a concealed manner:
  - A self-defense chemical spray.<sup>30</sup>
  - A nonlethal stun gun or dart-firing stun gun<sup>31</sup> or other nonlethal electric weapon or device that is designed solely for defensive purposes.<sup>32</sup>

The carrying of a concealed weapon in violation of s. 790.01, F.S., is statutorily designated as a breach of peace for which an officer may make a warrantless arrest if the officer has reasonable grounds or probable cause to believe that the offense of carrying a concealed weapon is being committed.<sup>33</sup>

Licensees are limited with regard to where they may carry a concealed weapon or concealed firearm. Section 790.06(12)(a), F.S., specifies that the license does not authorize a person to openly carry a handgun or carry a concealed weapon or firearm into:

- Any place of nuisance as defined in s. 823.05.
- Any police, sheriff, or highway patrol station.
- Any detention facility, prison, or jail.
- Any courthouse.
- Any courtroom, except that nothing in this section would preclude a judge from carrying a concealed weapon or determining who will carry a concealed weapon in his or her courtroom.
- Any polling place.
- Any meeting of the governing body of a county, public school district, municipality, or special district.
- Any meeting of the Legislature or a committee thereof.
- Any school, college, or professional athletic event not related to firearms.
- Any elementary or secondary school facility or administration building.
- Any career center.
- Any portion of an establishment licensed to dispense alcoholic beverages for consumption on the premises, which portion of the establishment is primarily devoted to such purpose.
- Any college or university facility unless the licensee is a registered student, employee, or faculty member of such college or university and the weapon is a stun gun or nonlethal electric weapon or device designed solely for defensive purposes and the weapon does not fire a dart or projectile.

<sup>24</sup> Section 790.001(3)(a), F.S., defines the term "concealed weapon" as "any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon carried on or about a person in such a manner as to conceal the weapon from the ordinary sight of another person." The weapons listed in this definition require licensure to carry them in a concealed manner.

<sup>25</sup> Section 790.001(14), F.S., defines the term "electric weapon or device" as "any device which, through the application or use of electrical current, is designed, redesigned, used, or intended to be used for offensive or defensive purposes, the destruction of life, or the infliction of injury."

<sup>26</sup> s. 790.01(1), F.S.

<sup>27</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082 and 775.083, F.S.

<sup>28</sup> Section 790.001(2), F.S., defines the term, "concealed firearm" as "any firearm, as defined in subsection (6), which is carried on or about a person in such a manner as to conceal the firearm from the ordinary sight of another person."

<sup>29</sup> s. 790.01(2), F.S.

<sup>30</sup> Section 790.001(3)(b), F.S., defines the term "self-defense chemical spray" as "a device carried solely for purposes of lawful self-defense that is compact in size, designed to be carried on or about the person, and contains not more than two ounces of chemical."

<sup>31</sup> Section 790.001(15), F.S., defines the term "dart-firing stun gun" as "any device having one or more darts that are capable of delivering an electrical current."

<sup>32</sup> s. 790.01(3), F.S.

<sup>33</sup> s. 790.02, F.S.



- The inside of the passenger terminal and sterile area of any airport, provided that no person shall be prohibited from carrying any legal firearm into the terminal, which firearm is encased for shipment for purposes of checking such firearm as baggage to be lawfully transported on any aircraft.
- Any place where the carrying of firearms is prohibited by federal law.

A person who knowingly and willfully carries a concealed weapon or firearm into any of the above-listed locations commits a second degree misdemeanor.<sup>34</sup>

*Exemptions from Open Carry Prohibitions and Concealed Carry Licensing Requirements:* Section 790.25(3), F.S., provides that certain persons under specified circumstances are exempt from the requirements for a license to carry concealed weapons or concealed firearms in s. 790.06, F.S., and the limitations on open carrying in s. 790.053, F.S. These persons and circumstances include:

- Members of the Militia, National Guard, Florida State Defense Force, Army, Navy, Air Force, Marine Corps, Coast Guard, organized reserves, and other armed forces of the state and of the United States, when on duty, when training or preparing themselves for military duty, or while subject to recall or mobilization.
- Citizens of this state subject to duty under certain sections of law if on duty or when training or preparing themselves for military duty.
- Persons carrying out or training for emergency management duties under chapter 252, F.S.
- Sheriffs, marshals, prison or jail wardens, police officers, Florida highway patrol officers, game wardens, revenue officers, forest officials, special officers appointed under the provisions of chapter 354, F.S., and other peace and law enforcement officers and their deputies and assistants and full-time paid peace officers of other states and of the Federal Government who are carrying out official duties while in this state.
- Officers or employees of the state or United States duly authorized to carry a concealed weapon.
- Guards or messengers of common carriers, express companies, armored car carriers, mail carriers, banks, and other financial institutions, while actually employed in and about the shipment, transportation, or delivery of any money, treasure, bullion, bonds, or other thing of value within this state.
- Regularly enrolled members of any organization duly authorized to purchase or receive weapons from the United States or from this state, or regularly enrolled members of clubs organized for target, skeet, or trap shooting, while at or going to or from shooting practice; or regularly enrolled members of clubs organized for modern or antique firearms collecting, while such members are at or going to or from their collectors' gun shows, conventions, or exhibits.
- A person engaged in fishing, camping, or lawful hunting or going to or returning from a fishing, camping, or lawful hunting expedition.
- A person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person while engaged in the lawful course of such business.
- A person firing weapons for testing or target practice under safe conditions and in a safe place not prohibited by law or going to or from such place.
- A person firing weapons in a safe and secure indoor range for testing and target practice.
- A person traveling by private conveyance when the weapon is securely encased or in a public conveyance when the weapon is securely encased and not in the person's manual possession.
- A person while carrying a pistol unloaded and in a secure wrapper, concealed or otherwise, from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business.
- A person possessing arms at his or her home or place of business.

<sup>34</sup> s. 790.06(12)(d), F.S.

- Investigators employed by the public defenders and capital collateral regional counsel of the state while carrying out official duties.<sup>35</sup>

### Other State Open Carry Laws

*States that Generally Permit Open Carry of Firearms.*<sup>36</sup> Forty-three states permit the open carrying of both long guns and handguns.<sup>37</sup> Of these states, 26 do not require a license and do not restrict whether the firearm is loaded or unloaded.<sup>38, 39</sup> Connecticut,<sup>40</sup> Georgia,<sup>41</sup> Maryland,<sup>42</sup> New Hampshire,<sup>43</sup> Rhode Island,<sup>44</sup> and Tennessee<sup>45</sup> require a license to openly carry a handgun, but not a long gun, such as a rifle or shotgun. Conversely, Massachusetts,<sup>46</sup> Minnesota,<sup>47</sup> New Jersey,<sup>48</sup> Texas,<sup>49</sup> and Utah<sup>50</sup> require a license to openly carry any firearm. The remaining six states permit open carry, but impose special limitations on the circumstances in which a person can openly carry a firearm.<sup>51</sup> For example, North Dakota limits the hours during which an unlicensed person may openly carry an unloaded handgun.<sup>52</sup>

Three states permit openly carrying specific types of firearms. South Carolina<sup>53</sup> permits openly carrying a long gun without a license, while prohibiting openly carrying a handgun in any circumstance. Hawaii<sup>54</sup> permits openly carrying a handgun with a license and prohibits openly carrying a long gun in any circumstance. Oklahoma<sup>55</sup> permits openly carrying a handgun with a license and prohibits openly carrying a long gun in most circumstances.

Some states regulate the manner of openly carrying a handgun. For example in Texas, licensees must carry the handgun in a shoulder or belt holster.<sup>56</sup> In Oklahoma, licensees may carry a “unconcealed handgun,” which means, “a loaded or unloaded pistol carried upon the person in a belt holster or shoulder holster that is wholly or partially visible, or carried upon the person in a scabbard or case designed for carrying firearms that is wholly or partially visible.”<sup>57</sup>

<sup>35</sup> s. 790.25(3), F.S.

<sup>36</sup> “Firearms” refers to both handguns and long guns.

<sup>37</sup> These states are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>38</sup> These states include Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oregon, South Dakota, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>39</sup> The status of Arkansas law is based on Attorney General Opinion No. 2015-064 issued August 28, 2015.

<sup>40</sup> CONN. GEN. STAT. §29-35.

<sup>41</sup> GA. CODE ANN. §§16-11-126 and 129(a).

<sup>42</sup> MD. CODE ANN. CRIM. LAW §4-203.

<sup>43</sup> A license is required if carrying a firearm in a vehicle or if carrying a loaded handgun, regardless of whether the firearm is concealed or openly carried. N.H. REV. STAT. ANN. §159:4.

<sup>44</sup> R.I. GEN. LAWS ANN. §11-47-18.

<sup>45</sup> A license is only required if openly carrying a *loaded* handgun. TENN. CODE ANN. §§39-17-1308 and 1351.

<sup>46</sup> MASS. GEN. LAWS ch. 140 §131.

<sup>47</sup> MINN. STAT. ANN. §§624.714 and 7181.

<sup>48</sup> A license is required to carry a handgun in an open or concealed manner. N.J. STAT. ANN. §2C:39-5(b). A license is also required to openly carry an *unloaded* long gun. Loaded long guns may not be openly carried. N.J. STAT. ANN. §2C:39-5(c) and §2C:58-3.

<sup>49</sup> TEX. PENAL CODE ANN. §46.02 and 46.15(b).

<sup>50</sup> A person may not carry a loaded firearm openly or concealed in most places. UTAH CODE ANN. §76-10-505. However, this restriction does not apply to holders of a concealed weapon license issued under UTAH CODE ANN. §53-5-704. UTAH CODE ANN. §76-10-523(2)(a).

<sup>51</sup> Indiana, Iowa, Missouri, Ohio, Oregon, and Pennsylvania

<sup>52</sup> N.D. CENT CODE ANN. §62.1-03-01.

<sup>53</sup> S.C. CODE ANN. §16-23-20.

<sup>54</sup> HAW. REV. STAT. §§134-9 and 134-25.

<sup>55</sup> OKLA. STAT. ANN. tit. 21, §§1290.5 and 1289.6.

<sup>56</sup> TEX. PENAL CODE ANN. §46.02(a-1) (effective January 1, 2016).

<sup>57</sup> OKLA. STAT. ANN. tit. 21, §§1290.2 and 1290.8.

*States that Prohibit Open Carry:* The District of Columbia,<sup>58</sup> Florida,<sup>59</sup> Illinois,<sup>60</sup> and New York,<sup>61</sup> prohibit the open carry of both handguns and long guns. California does not statutorily prohibit the open carrying of all firearms; however, the restrictions on openly carrying a firearm in the state result in very limited ability to openly carry.<sup>62</sup>

#### Effect of Bill

The bill creates s. 776.00111, F.S., to require the judiciary to employ strict scrutiny in reviewing any statute that implicates the right to bear arms or defend one's self pursuant to ch. 776, F.S. The new section of law further states that the right to bear arms or defend one's self is a fundamental and individual right that exists in any place that a person has the right to be, subject only to *exceptionally and narrowly tailored restrictions that employ the least possible restriction on the right in order to achieve a compelling government interest*. The italicized language is similar to verbiage used by Florida courts when describing the requirements of strict scrutiny review.<sup>63</sup>

The bill creates s. 790.0015, F.S., which specifies, "Unless probable cause exists to believe that a crime has been committed by an individual, any public entity subject to s. 790.33, or person acting on behalf of such public entity, infringing on the rights conferred on that individual by this chapter, chapter 776, s. 8, Art. I of the State Constitution, or the Second Amendment to the United States Constitution is liable pursuant to s. 790.33(3)(c), (d), (e), and (f)." As discussed *supra*, s. 790.33(3)(c) through (f), F.S., provide for:

- A civil fine of up to \$5,000 for a local government official or administrative agency head under whose jurisdiction a knowing and willful violation of legislative preemption has occurred. Additionally, such violation by a person acting in an official capacity for any entity that commits a violation is cause for termination of employment or contract or removal from office by the Governor.
- A county, agency, municipality, district, or other entity to be liable to a prevailing plaintiff for actual damages, up to \$100,000, and attorney fees and costs, including a contingency fee multiplier, if the plaintiff is found to have been adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of the preemption.

With respect to the aforementioned liability, the bill states, "Notwithstanding any other provision of law, no immunity applies to such a public entity, or person acting on behalf of such public entity, infringing on such rights in violation of this section."

The bill also provides that chapters 790 and 776 F.S., s. 8, Art. I of the State Constitution, and the Second Amendment to the United States Constitution: do not modify or diminish the rights of a private owner or lessee of real property, or a private employer to prohibit the possession of a firearm on the property or to post or display written notice or communicate to any person on the property that the possession of a firearm is prohibited on the property; do not expand any existing duty, or create any additional duty, on the part of a private owner or lessee of real property, or its agent, or a private employer.

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<sup>58</sup> D.C. CODE §22-4504.01.

<sup>59</sup> s. 790.053, F.S.

<sup>60</sup> ILL. COMP. STAT. 5/24-1(a)(4).

<sup>61</sup> N.Y. PENAL §265.01.

<sup>62</sup> It is illegal to carry any loaded firearm in an open or concealed manner, CAL. PENAL §25850, or to openly carry an unloaded handgun, CAL. PENAL §26350, in any public place in an incorporated city or on a public street in any prohibited area of an unincorporated territory.

<sup>63</sup> In *Norman v. State*, the Fourth District described strict scrutiny as requiring, "the Government to prove that [a challenged law] 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Norman*, 159 So.3d at 220. The Florida Supreme Court has stated, "To withstand strict scrutiny, a law must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest. \*\*\* Strict scrutiny requires the State to demonstrate that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *State v. T.M.*, 907 So.2d 1101 (Fla. 2004)(citations omitted).

The bill creates s. 790.0016, F.S., to provide that no employee will have cause of action against an employer, including termination of employment, resulting from failure of the employee to comply with the employer's orders regarding the carrying or not carrying of a weapon during working hours. The section specifies that this does not impair a cause of action against employers arising from another statutory or constitutional provision.

The bill amends s. 790.02, F.S., which authorizes an officer to make a warrantless arrest for the carrying of a concealed weapon in violation of s. 790.01, F.S., when the officer has reasonable grounds or probable cause to believe such offense has been committed, to:

- Clarify that its provisions apply to the *unlicensed* carrying of a concealed weapon.
- Delete authorization for such warrantless arrests based on reasonable grounds. Thus, warrantless arrests may only be based upon probable cause.

The bill amends s. 790.053(1), F.S., which currently prohibits any person, unless exempted, to openly carry firearms and electronic weapons or devices, to authorize concealed carry licensees to openly carry firearms or weapons subject to the requirements of s. 790.06, F.S., (license to carry concealed firearm) and s. 790.10, F.S. (improper exhibition of a firearm).

Finally, the bill amends s. 790.25, F.S., to:

- Specify that the Legislature finds that the possession and carrying of weapons and firearms by law-abiding individuals for lawful purposes, including self-defense, enhances public safety.
- Require the judiciary to construe this act in conjunction with the right to bear arms or defend one's self as provided in chapter 776.
- Specify that the right to bear arms or defend one's self is a fundamental and individual right that exists in any place that a person has the right to be, subject only to exceptionally and narrowly tailored restrictions that employ the least possible restriction on the right in order to achieve a compelling government interest.

#### B. SECTION DIRECTORY:

Section 1. Creates s. 776.00111, F.S., relating to construction of statutes that implicate the right to bear arms or defend one's self.

Section 2. Creates s. 790.0015, F.S., relating to the infringement of rights and penalties for such infringement.

Section 3. Creates s. 790.0016, F.S., relating to employer weapons policies.

Section 4. Amends s. 790.02, F.S., relating to warrantless arrests for concealed weapon carry violations.

Section 5. Amends s. 790.053, F.S., relating to the open carrying of weapons.

Section 6. Amends s. 790.25, F.S., relating to lawful ownership, possession, and use of firearms and other weapons.

Section 7. Provides that the bill is effective upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The Criminal Justice Impact Conference met on October 28, 2015, and determined that the impact of this bill on Department of Correction's prison beds is indeterminate but will likely decrease prison beds. In Fiscal Year 2014-2015, there were 1,320 offenders sentenced under s. 790.01, F.S. for carrying a concealed weapon or firearm and 174 of these offenders were sentenced to prison. It is unknown how many of these offenders were convicted due to a warrantless arrest (the bill now requires probable cause for an arrest) that would not have not been sentenced to prison.

If litigation is generated by the bill's requirement that the judiciary employ strict scrutiny in reviewing statutes that implicate the right to bear arms or defend one's self, there will be an indeterminate fiscal impact for litigation costs.

The fines and damages and attorney fee and cost awards under s. 790.0015, F.S., could result in a fiscal impact for violations by state government entities.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill limits application of the second degree misdemeanor penalty for the open carrying of firearms and electronic devices to persons who are not licensed to concealed carry. As such, the bill may decrease the need for jail beds.

The fines and damages and attorney fee and cost awards under s. 790.0015, F.S., could result in a fiscal impact for violations by local government entities.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

## 2. Other:

*Strict Scrutiny:* The bill creates s. 776.00111, F.S., and amends s. 790.25(4), F.S., to require the judiciary to employ strict scrutiny in reviewing any statute that implicates the right to bear arms or defend one's self. In directing the judiciary to employ a certain standard of review, issues might be raised under the Separation of Powers Doctrine set forth in Article II, Section 3 of the Florida Constitution,<sup>64</sup> which prohibits any branch of state government from encroaching upon the powers of another,<sup>65</sup> because the judicial branch is responsible for interpreting and determining the constitutionality of statutes.<sup>66</sup>

There is precedent in Florida Statute for a similar legislative prescription of strict scrutiny review. Section 761.03, F.S. (emphasis added), of the Florida Religious Freedom Restoration Act (FRFRA) of 1998, states:

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, *except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:*

(a) *Is in furtherance of a compelling governmental interest; and*

(b) *Is the least restrictive means of furthering that compelling governmental interest.*

(2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

There is no case law considering the constitutionality of this statute.

*Immunity Waiver:* In s. 790.0015, F.S., the bill appears to impose liability on a public entity that, or person acting on behalf of the entity who, without probable cause to believe a crime has been committed, infringes on an individual's rights to bear arms or defend one's self. The bill further states that, "Notwithstanding any other law, no immunity shall apply to persons or entities infringing on such rights in violation of this section." The term "law" is not defined. According to Black's Law Dictionary (10<sup>th</sup> ed. 2014), the term "law" means "[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them ...."

Law emanating from federal and state statutes, court decisions, and the common law affords a variety of immunities from liability. For example, s. 768.28(9), F.S., provides that an officer, employee, or agent of the state or its subdivisions may not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment, unless certain exceptions apply. Prosecutorial and judicial immunity derived from the common law is afforded to prosecutors and judges because "a strict guarantee of immunity is necessary to preserve the effectiveness and impartiality of judicial and quasi-judicial offices."<sup>67</sup> Qualified or absolute immunity in actions under 42 U.S.C. s. 1983, for a deprivation of civil rights is afforded to legislative, executive, and judicial branch government officials under certain circumstances.<sup>68</sup>

Due to bill's general waiver of immunity, it is difficult to determine all of the precise immunities that may be waived. The Florida Supreme Court has held that it is a violation of the Separation of Powers

<sup>64</sup> Holly Martin, *Legislating Judicial Review: An Infringement on Separation of Powers*, 17 N.Y.U.J. Legis. & Pub. Pol'y 1097, 1115 (2014).

<sup>65</sup> *Chiles v. Children A,B,C,D,E, and F*, 589 So. 260, 263-64 (Fla. 1991).

<sup>66</sup> *Chiles v. Phelps v. Webster*, 714 So.2d 453, 456 (Fla. 1998).

<sup>67</sup> *Office of State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So.2d 1097, 1098-99 (Fla. 1993).

<sup>68</sup> See, e.g., *Junior v. Reed*, 693 So.2d 586 (1st DCA 1997); *Greason v. Kemp*, 891 F.2d 829, 833 (11th Cir.1990); and *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Doctrine set forth in Article II, Section 3 of the Florida Constitution for the Legislature to waive prosecutorial or judicial immunity.<sup>69</sup> Additionally, if the bill were construed to waive a federal law immunity, legal challenges might be brought based on an argument that such waiver violates the Supremacy Clause set forth in Article VI, Clause 2 of U.S. Constitution.<sup>70</sup>

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

Article I, section 8(a) of the Florida Constitution (emphasis added), in relevant part, states, "The right of the people to keep and *bear arms in defense of themselves* and of the lawful authority of the state shall not be infringed . . . ." Throughout the bill, references are made to "the right to *bear arms or defend one's self*."

In s. 790.0015, F.S., the bill requires, through a cross-reference to s. 790.33(3)(c)-(f), F.S., that public entities and persons acting on behalf of such entities which infringe on specified rights to bear arms or defend one's self be held liable for civil fines, subject to termination from government employment, and liable for actual damages and attorney fees and costs. Section 790.33, F.S., however, addresses violations by government entities and officials of the Legislature's preemption of the field of firearms and ammunitions. Due to the differences in the types of violations created by the bill in s. 790.0015, F.S., and in existing law in s. 790.33, F.S., there may not be sufficient guidance in the bill for implementation of the cited penalty scheme in s. 790.033(3), F.S., for violations of s. 790.0015, F.S.

In s. 790.25(4), F.S., the bill refers to "this act." For clarity, it may be desirable to amend the bill to specifically cite the chapter, section, or portion of a section to which it is referring.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On October 6, 2015, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment created a new s. 790.0015, F.S., in Section 2. of the bill so that the bill's prohibition against persons or entities infringing on specified rights to bear arms or defend one's self would be set forth in a stand-alone section of law. The amendment also revised terminology in order to use the phrase "right to bear arms or defend one's self" consistently throughout the bill.

On November 18, 2015, the Justice Appropriation Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The amendments:

- Provide that chapters 790 and 776 F.S., s. 8, Art. I of the State Constitution, and the Second Amendment to the United States Constitution: do not modify or diminish the rights of a private owner or lessee of real property, or a private employer to prohibit the possession of a firearm on the property or to post or display written notice or communicate to any person on the property that the possession of a firearm is prohibited on the property; do not expand any existing duty, or create any additional duty, on the part of a private owner or lessee of real property, or its agent, or a private employer.
- Clarifies that those authorized to openly carry firearms or weapons are subject to the requirements of s. 790.06, F.S., (license to carry concealed firearm) and s. 790.10, F.S. (improper exhibition of a firearm).

<sup>69</sup> The Florida Supreme Court has stated, "While the legislature has authority to waive immunity for those organs of government within its purview, the legislature cannot take actions that would undermine the independence of Florida's judicial and quasi-judicial offices. This would violate the doctrine of separation of powers. Art. II, § 3, Fla. Const." *Office of State Attorney, Fourth Judicial Circuit of Florida*, 628 So.2d at 1099.

<sup>70</sup> The Florida Supreme Court has stated, "Under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, state laws may be preempted by federal laws in three situations: (1) where express federal statutory language so provides; (2) where federal law has so thoroughly occupied a legislative field as to create a reasonable inference that there is no room for the state to supplement it; or (3) where a state law conflicts with a federal law." *Rosado v. DaimlerChrysler Financial Services Trust*, 112 So.3d 1165 (Fla. 2013).

- Provides that no employee will have cause of action against an employer, including termination of employment, resulting from failure of the employee to comply with the employer's orders regarding the carrying or not carrying of a weapon during working hours.

This bill analysis is drafted to the committee substitute adopted by the Justice Appropriations Subcommittee.



1                                   A bill to be entitled  
 2           An act relating to weapons and firearms; creating s.  
 3           776.00111, F.S.; providing for construction of  
 4           statutes that implicate the right to bear arms or  
 5           defend one's self; creating s. 790.0015, F.S.;  
 6           providing that certain persons and public entities  
 7           that infringe on specified rights of an individual may  
 8           be subject to liability under specified provisions and  
 9           have no immunity; providing an exception; providing  
 10          construction; creating s. 790.0016, F.S.; providing  
 11          that an employer may direct an employee regarding  
 12          weapons; providing that an employee has no cause of  
 13          action against an employer regarding such direction;  
 14          providing construction; amending s. 790.02, F.S.;  
 15          specifying that a law enforcement officer may arrest a  
 16          person for the unlicensed carrying of a concealed  
 17          weapon only upon probable cause that such a violation  
 18          is being committed; amending s. 790.053, F.S.;  
 19          providing that a person licensed to carry a concealed  
 20          firearm or weapon may also openly carry such firearm  
 21          or weapon as long as such person is in compliance with  
 22          specified provisions; amending s. 790.25, F.S.;  
 23          revising legislative findings concerning the  
 24          possession and carrying of weapons and firearms;  
 25          revising provisions concerning the construction of  
 26          provisions; providing an effective date.

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

Section 1. Section 776.00111, Florida Statutes, is created to read:

776.00111 Construction.—The judiciary shall employ strict scrutiny in reviewing any statute that implicates the right to bear arms or defend one's self pursuant to this chapter. The right to bear arms or defend one's self is a fundamental and individual right that exists in any place that a person has the right to be, subject only to exceptionally and narrowly tailored restrictions that employ the least possible restriction on the right in order to achieve a compelling government interest.

Section 2. Section 790.0015, Florida Statutes, is created to read:

790.0015 Infringement of rights; penalties; construction.—  
(1) Unless probable cause exists to believe that a crime has been committed by an individual, any public entity subject to s. 790.33, or person acting on behalf of such public entity, infringing on the rights conferred on that individual or entity by this chapter, chapter 776, s. 8, Art. I of the State Constitution, or the Second Amendment to the United States Constitution is liable pursuant to s. 790.33(3)(c), (d), (e), and (f). Notwithstanding any other provision of law, no immunity applies to such a public entity, or person acting on behalf of such public entity, infringing on such rights in violation of

53 | this section.

54 |       (2)(a) This chapter, chapter 776, s. 8, Art. I of the  
 55 | State Constitution, and the Second Amendment to the United  
 56 | States Constitution do not modify or diminish the rights of a  
 57 | private owner or lessee of real property, or its agent, or a  
 58 | private employer, to prohibit the possession of a firearm on the  
 59 | property or to post or display written notice or otherwise  
 60 | directly communicate to any person on the property that the  
 61 | possession of a firearm is prohibited on the property.

62 |       (b) This chapter, chapter 776, s. 8, Art. I of the State  
 63 | Constitution, and the Second Amendment to the United States  
 64 | Constitution do not expand any existing duty, or create any  
 65 | additional duty, on the part of a private owner or lessee of  
 66 | real property, or its agent, or a private employer.

67 |       Section 3. Section 790.0016, Florida Statutes, is created  
 68 | to read:

69 |       790.0016 Employer weapons policies.—An employee shall not  
 70 | have a cause of action against an employer related to  
 71 | disciplinary action of the employer, including termination of  
 72 | employment, resulting from the failure of the employee to comply  
 73 | with an order of the employer to carry, or not to carry, or the  
 74 | manner of carrying, a weapon on his or her person during work  
 75 | hours. This section does not impair a cause of action against  
 76 | employers arising from another statutory or constitutional  
 77 | provision.

78 |       Section 4. Section 790.02, Florida Statutes, is amended to

79 | read:

80 |       790.02 Officer to arrest without warrant and upon probable  
81 | cause.—The unlicensed carrying of a concealed weapon is declared  
82 | a breach of peace, and any officer authorized to make arrests  
83 | under the laws of this state may make arrests without warrant of  
84 | persons violating ~~the provisions of~~ s. 790.01 when said officer  
85 | has ~~reasonable grounds or~~ probable cause to believe that the  
86 | offense of unlicensed carrying of a concealed weapon is being  
87 | committed.

88 |       Section 5. Section 790.053, Florida Statutes, is amended  
89 | to read:

90 |       790.053 Open carrying of weapons.—

91 |       (1) Subject to ss. 790.06 and 790.10, a person licensed to  
92 | carry a concealed firearm or weapon pursuant to this chapter may  
93 | openly carry such firearm or weapon; however, except as  
94 | otherwise provided by law and in subsection (2), it is unlawful  
95 | for any other person to openly carry on or about his or her  
96 | person a ~~any~~ firearm or electric weapon or device. ~~It is not a~~  
97 | ~~violation of this section for a person licensed to carry a~~  
98 | ~~concealed firearm as provided in s. 790.06(1), and who is~~  
99 | ~~lawfully carrying a firearm in a concealed manner, to briefly~~  
100 | ~~and openly display the firearm to the ordinary sight of another~~  
101 | ~~person, unless the firearm is intentionally displayed in an~~  
102 | ~~angry or threatening manner, not in necessary self-defense.~~

103 |       (2) A person may openly carry, for purposes of lawful  
104 | self-defense:

105 (a) A self-defense chemical spray.

106 (b) A nonlethal stun gun or dart-firing stun gun or other  
 107 nonlethal electric weapon or device that is designed solely for  
 108 defensive purposes.

109 (3) Any person violating this section commits a  
 110 misdemeanor of the second degree, punishable as provided in s.  
 111 775.082 or s. 775.083.

112 Section 6. Subsections (1) and (4) of section 790.25,  
 113 Florida Statutes, are amended to read:

114 790.25 Lawful ownership, possession, and use of firearms  
 115 and other weapons.—

116 (1) DECLARATION OF POLICY.—The Legislature finds as a  
 117 matter of public policy and fact that the possession and  
 118 carrying of weapons and firearms by law-abiding individuals for  
 119 lawful purposes, including self-defense, enhances public safety  
 120 and that it is necessary to promote firearms safety and to curb  
 121 and prevent the use of firearms and other weapons in crime and  
 122 by incompetent persons without prohibiting the lawful use in  
 123 defense of life, home, and property, and the use by United  
 124 States or state military organizations, and as otherwise now  
 125 authorized by law, including the right to use and own firearms  
 126 for target practice and marksmanship on target practice ranges  
 127 or other lawful places, and lawful hunting and other lawful  
 128 purposes.

129 (4) CONSTRUCTION.—The judiciary shall construe this act in  
 130 conjunction with the right to bear arms or defend one's self as

131 provided in chapter 776. The right to bear arms or defend one's  
132 self is a fundamental and individual right that exists in any  
133 place that a person has the right to be, subject only to  
134 exceptionally and narrowly tailored restrictions that employ the  
135 least possible restriction on the right in order to achieve a  
136 compelling government interest. This act shall be liberally  
137 construed to carry out the declaration of policy herein and in  
138 favor of the constitutional right to keep and bear arms for  
139 lawful purposes. This act is supplemental and additional to  
140 existing rights to bear arms now guaranteed by law and decisions  
141 of the courts of Florida, and nothing herein shall impair or  
142 diminish any of such rights. This act shall supersede any law,  
143 ordinance, or regulation in conflict herewith.

144 Section 7. This act shall take effect upon becoming a law.



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	___	

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1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Gaetz offered the following:

**Amendment (with title amendment)**

Remove everything after the enacting clause and insert:

6 Section 1. Section 790.0015, Florida Statutes, is created  
7 to read:

790.0015 Infringement of rights; penalties; construction.-

9 (1) Section 790.33, including the penalty provisions of s.  
10 790.33(3)(c), (d), (e), and (f), apply to any person or entity  
11 infringing upon the rights conferred by this chapter, chapter  
12 766, s. 8, Art. I of the State Constitution, or the Second  
13 Amendment to the United States Constitution. Notwithstanding any  
14 other law, no immunity applies to persons or entities infringing  
15 on such rights in violation of s. 790.33.



Amendment No. 1

16 (2) This section is not intended to restrict a law  
17 enforcement officer's ability or authority to conduct  
18 investigations as otherwise authorized by law.

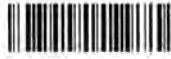
19 (3)(a) This chapter, chapter 776, s. 8, Art. I of the  
20 State Constitution, and the Second Amendment to the United  
21 States Constitution do not modify or diminish the rights of a  
22 private owner or lessee of real property or its agent, or a  
23 private employer, to prohibit the possession of a firearm on  
24 real property or at the place of employment or to post or  
25 display written notice or otherwise directly communicate to any  
26 person on the real property or at the place of employment that  
27 the possession of a firearm is prohibited.

28 (b) This chapter, chapter 776, s. 8, Art. I of the State  
29 Constitution, and the Second Amendment to the United States  
30 Constitution do not expand any existing duty of, or create any  
31 additional duty for, a private owner or lessee of real property  
32 or its agent, or a private employer.

33 Section 2. Section 790.0016, Florida Statutes, is created  
34 to read:

35 790.0016 Employer weapons policies.—An employee shall not  
36 have a cause of action against an employer related to  
37 disciplinary action of the employer, including termination of  
38 employment, resulting from the failure of the employee to comply  
39 with an order of the employer to carry or not carry, or relating  
40 to the manner of carrying, a weapon on his or her person during  
41 work hours. This section does not impair a cause of action





Amendment No. 1

42 against an employer which arises under another law.

43 Section 3. Section 790.02, Florida Statutes, is amended to  
44 read:

45 790.02 Officer to arrest without warrant and upon probable  
46 cause.—The unlicensed carrying of a concealed weapon is declared  
47 a breach of peace, and any officer authorized to make arrests  
48 under the laws of this state may make arrests without warrant of  
49 persons violating ~~the provisions of~~ s. 790.01 when said officer  
50 has reasonable ~~grounds~~ suspicion or probable cause to believe  
51 that the offense of unlicensed carrying of a concealed weapon is  
52 being committed.

53 Section 4. Section 790.053, Florida Statutes, is amended  
54 to read:

55 790.053 Open carrying of weapons.—

56 (1) Subject to the restrictions and limitations of ss.  
57 790.06 and 790.10, a person licensed to carry a concealed weapon  
58 or concealed firearm pursuant to this chapter may openly carry  
59 such weapon or firearm ; however, except as otherwise provided  
60 by law and in subsection (3)(2), it is unlawful for any other  
61 person to openly carry on or about his or her person a ~~any~~  
62 firearm or electric weapon or device. It is not a violation of  
63 this section for a person licensed to carry a concealed firearm  
64 as provided in s. 790.06(1), and who is lawfully carrying a  
65 firearm in a concealed manner, to briefly and openly display the  
66 firearm to the ordinary sight of another person, unless the  
67 firearm is intentionally displayed in an angry or threatening

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68 ~~manner, not in necessary self-defense.~~

69 (2) A firearm that is openly carried under this section by  
70 a licensee may be loaded or unloaded and must be carried on or  
71 about the licensee in a holster that is wholly or partially  
72 visible, or carried on or about the licensee in a case or bag  
73 that is wholly or partially visible.

74 (3)+2+ A person may openly carry, for purposes of lawful  
75 self-defense:

76 (a) A self-defense chemical spray.

77 (b) A nonlethal stun gun or dart-firing stun gun or other  
78 nonlethal electric weapon or device that is designed solely for  
79 defensive purposes.

80 (3) Any person violating this section commits a  
81 misdemeanor of the second degree, punishable as provided in s.  
82 775.082 or s. 775.083.

83 Section 5. Subsection (1) of section 790.25, Florida  
84 Statutes, is amended to read:

85 790.25 Lawful ownership, possession, and use of firearms  
86 and other weapons.—

87 (1) DECLARATION OF POLICY.—The Legislature finds as a  
88 matter of public policy and fact that the possession and  
89 carrying of weapons and firearms by law-abiding individuals for  
90 lawful purposes, including self-defense, enhances public safety  
91 and that it is necessary to promote firearms safety and to curb  
92 and prevent the use of firearms and other weapons in crime and  
93 by incompetent persons without prohibiting the lawful use in

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94 defense of life, home, and property, and the use by United  
95 States or state military organizations, and as otherwise now  
96 authorized by law, including the right to use and own firearms  
97 for target practice and marksmanship on target practice ranges  
98 or other lawful places, and lawful hunting and other lawful  
99 purposes.

100 Section 6. This act shall take effect upon becoming a law.  
101  
102

103 -----  
104 **T I T L E A M E N D M E N T**

105 Remove everything before the enacting clause and insert:  
106 An act relating to weapons and firearms; creating s. 790.0015,  
107 F.S.; providing that certain persons and public entities that  
108 infringe on specified rights of an individual may be subject to  
109 liability under specified provisions and have no immunity;  
110 providing an exception; providing construction; creating s.  
111 790.0016, F.S.; providing that an employer may direct an  
112 employee regarding weapons; providing that an employee has no  
113 cause of action against an employer regarding such direction;  
114 providing construction; amending s. 790.02, F.S.; specifying  
115 that a law enforcement officer may arrest a person for the  
116 unlicensed carrying of a concealed weapon only upon probable  
117 cause that such a violation is being committed; amending s.  
118 790.053, F.S.; providing that a person licensed to carry a  
119 concealed firearm or weapon may also openly carry such firearm



Amendment No. 1

120 or weapon as long as such person is in compliance with specified  
121 provisions; amending s. 790.25, F.S.; revising legislative  
122 findings concerning the possession and carrying of weapons and  
123 firearms; providing an effective date.



Amendment No. SA to Am 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	___	

1 Committee/Subcommittee hearing bill: Judiciary Committee  
 2 Representative Kerner offered the following:

3  
 4 **Substitute Amendment for Amendment (736117) by**  
 5 **Representative Gaetz (with title amendment)**

6 Remove everything after the enacting clause and insert:

7 Section 1. Section 790.053, Florida Statutes, is amended  
 8 to read:

9 790.053 Open carrying of weapons.—

10 (1) Except as otherwise provided by law and in subsection  
 11 (2), it is unlawful for any person to openly carry on or about  
 12 his or her person any firearm or electric weapon or device. ~~It~~  
 13 ~~is not a violation of this section for a person licensed to~~  
 14 ~~carry a concealed firearm as provided in s. 790.06(1), and who~~  
 15 ~~is lawfully carrying a firearm in a concealed manner, to briefly~~  
 16 ~~and openly display the firearm to the ordinary sight of another~~



Amendment No. SA to Am 1

17 | ~~person, unless the firearm is intentionally displayed in an~~  
18 | ~~angry or threatening manner, not in necessary self-defense.~~

19 | (2) A person may openly carry, for purposes of lawful  
20 | self-defense:

21 | (a) A self-defense chemical spray.

22 | (b) A nonlethal stun gun or dart-firing stun gun or other  
23 | nonlethal electric weapon or device that is designed solely for  
24 | defensive purposes.

25 | (3) It is not unlawful for a person licensed to carry a  
26 | concealed weapon or firearm who is lawfully carrying such a  
27 | firearm to inadvertently or accidentally display the firearm to  
28 | the sight of another person if the display is unintentional, not  
29 | deliberate, not done in a clearly open and obvious manner, and  
30 | necessary for self-defense. This subsection does not apply to  
31 | violations of s. 790.10.

32 | (a) If a person licensed to carry a concealed weapon or  
33 | firearm complies with this subsection, the person is immune from  
34 | criminal arrest and prosecution, and there is a presumption that  
35 | the person has not violated this subsection.

36 | (b) A law enforcement officer may not arrest a person  
37 | licensed to carry a concealed weapon or firearm for a violation  
38 | of this subsection unless the officer, before the arrest,  
39 | affords the person an opportunity to explain whether the firearm  
40 | was lawfully displayed in a manner that does violate this  
41 | subsection. A person may not be convicted of an offense under  
42 | this subsection if the officer does not comply with the



Amendment No. SA to Am 1

43 procedures required by this paragraph or if it appears at trial  
44 that the explanation given by the person at the time of his or  
45 her arrest is true and, if believed by the officer at that time,  
46 would have prevented the person from being arrested for a  
47 violation of this subsection.

48 (c) If a person arrested under this subsection is  
49 acquitted or found not guilty, or the charges are otherwise  
50 dismissed or nolle prosequi, the person may apply for a  
51 certificate of eligibility to expunge the criminal history  
52 record associated with the arrest pursuant to s. 943.0585(5),  
53 notwithstanding the eligibility requirements of s.  
54 943.0585(1)(b) and (2).

55 ~~(4)(3)~~ A Any person violating this section commits a  
56 misdemeanor of the second degree, punishable as provided in s.  
57 775.082 or s. 775.083.

58 Section 2. This act shall take effect upon becoming a law.  
59

60 -----

61 **T I T L E A M E N D M E N T**

62 Remove everything before the enacting clause and insert:

63 A bill to be entitled

64 An act relating to weapons and firearms; amending s.  
65 790.053, F.S.; deleting provisions concerning brief  
66 and open display of a firearm; providing that it is  
67 not unlawful for a person licensed to carry a  
68 concealed weapon or firearm who is lawfully carrying



Amendment No. SA to Am 1



69 such a firearm to inadvertently or accidentally  
70 display the firearm to the sight of another person in  
71 certain circumstances; providing immunity from arrest  
72 and prosecution for such persons; providing a  
73 presumption of innocence for such persons; specifying  
74 procedures for the arrest of such persons for certain  
75 violations; providing for expungement of certain  
76 criminal history records in certain circumstances;  
77 providing an effective date.





## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 257 Terroristic Threats  
**SPONSOR(S):** Criminal Justice Subcommittee; Smith and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 436

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Keegan	White
2) Justice Appropriations Subcommittee	10 Y, 0 N	McAuliffe	Lloyd
3) Judiciary Committee		Keegan 	Havlicak 

### SUMMARY ANALYSIS

Florida law currently imposes criminal penalties for making specific types of threats, as well as false reports regarding explosives or other destructive devices. However, such a threat or report must fall into narrow categories to be criminal. There are a number of states throughout the nation that criminalize threats of violence when made with the intent to cause some type of harm, such as an evacuation or other serious public inconvenience. Florida currently does not have such a prohibition in place.

The bill makes it a third degree felony for a person to threaten to commit a crime of violence with the intent to cause, or with reckless disregard for causing:

- Terror; or
- The evacuation of a building, place of assembly, or facility of public transportation.

A violation is punishable as a second degree felony, if the violation:

- Causes the occupants of a building, place of assembly, or facility of public transportation to be diverted from their normal or customary operations;
- Involves a threat against instructional personnel, a law enforcement officer, state attorney or assistant state attorney, firefighter, judge, or elected official; or
- Involves a threat against a family member of instructional personnel, a law enforcement officer, state attorney or assistant state attorney, firefighter, judge, or elected official.

The Criminal Justice Impact Conference met on October 28, 2015, and determined that this bill will have an insignificant prison bed impact on the Department (i.e., an increase of ten or fewer prison beds). See Fiscal Impact Statement.

This bill is effective July 1, 2016.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Current Situation**

Florida law currently imposes criminal penalties for making specific types of threats, as well as false reports regarding explosives or other destructive devices. Such a threat or report must fall into one of several narrow categories to constitute a crime, with varying penalties depending on the type of threat or report that is made.

There are a number of states throughout the nation that criminalize threats of violence against others. Many of these states criminalize threats of violence when made with the intent to cause some type of harm, such as terror, an evacuation, or other serious public inconvenience.<sup>1</sup> Florida currently does not have such a prohibition in place.

##### Written Threat to Kill

It is currently a second degree felony<sup>2</sup> to write or compose and send, or procure the sending, of any written or electronic communication containing a threat to kill or do bodily injury to the person to whom the letter or communication is sent, or a threat to kill or do bodily injury to the family of the person to whom such letter or communication is sent.<sup>3</sup>

This prohibition does not apply to unwritten threats, such as a threat made over the telephone, nor does it apply to written threats against a third party who is not the person, or the family of the person, to whom the letter was sent.

##### Threat Regarding a Destructive Device

It is currently a second degree felony for any person to threaten to throw, project, place, or discharge any destructive device<sup>4</sup> with intent to do bodily harm to any person or with intent to do damage to any property of any person.<sup>5</sup> A conviction under this statute does not require proof that the accused actually intended to follow through with the threat, only that the threat conveyed the intent to do bodily harm to another.<sup>6</sup>

This prohibition applies to both written and unwritten threats, but it does not apply to threats to do violence to a person without the use of a destructive device.

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<sup>1</sup> See, e.g., ALA. CODE §13A-10-15; GA. CODE ANN. §16-11-37; N.J. STAT. ANN. §2C:12-3; WYO. STAT. ANN. §6-2-505;

<sup>2</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

<sup>3</sup> s. 836.10, F.S.

<sup>4</sup> Section 790.001(4), F.S., defines "destructive device" as any bomb, grenade, mine, rocket, missile, pipebomb, or similar device containing an explosive, incendiary, or poison gas and includes any frangible container filled with an explosive, incendiary, explosive gas, or expanding gas, which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled; any device declared a destructive device by the Bureau of Alcohol, Tobacco, and Firearms; any type of weapon which will, is designed to, or may readily be converted to expel a projectile by the action of any explosive and which has a barrel with a bore of one-half inch or more in diameter; and ammunition for such destructive devices, but not including shotgun shells or any other ammunition designed for use in a firearm other than a destructive device. "Destructive device" does not include: (1) A device which is not designed, redesigned, used, or intended for use as a weapon; (2) Any device, although originally designed as a weapon, which is redesigned so that it may be used solely as a signaling, line-throwing, safety, or similar device; (3) Any shotgun other than a short-barreled shotgun; or (4) Any nonautomatic rifle (other than a short-barreled rifle) generally recognized or particularly suitable for use for the hunting of big game.

<sup>5</sup> s. 790.162, F.S.

<sup>6</sup> *Reid v. State*, 405 So. 2d 500 (Fla. 2d DCA 1981).

### Threat against a Public Servant

It is unlawful to harm or threaten to harm any public servant, his or her immediate family, or any other person with whose welfare the public servant is interested, with the intent to:

- Influence the performance of any act or omission that the person believes to be, or that the public servant represents as being, within the official discretion of the public servant, in violation of a public duty, or in performance of, a public duty.
- Cause or induce the public servant to use or exert any influence on another public servant regarding any act or omission that the person believes to be, or that the public servant represents as being, within the official discretion of the public servant in violation of a public duty, or in performance of a public duty.<sup>7</sup>

It is a second degree felony to unlawfully harm any public servant or another other person with whose welfare the public servant is interested.<sup>8</sup> It is a third degree felony<sup>9</sup> to threaten unlawful harm to any public servant or to any other person with whose welfare the public servant is interested.<sup>10</sup>

This prohibition criminalizes both written and unwritten threats; however, it only applies to a threat that is made with the intent to influence or coerce a public servant. This prohibition is also limited to criminalizing threats made against public servants, their families, and other people with whose welfare the public servant is interested, and does not criminalize threats against other members of the public.

### False Reports

It is a second degree felony for any person to make a false report, with intent to deceive, mislead, or otherwise misinform any person, concerning the place or planting of any bomb, dynamite, other deadly explosive, or weapon of mass destruction,<sup>11</sup> or concerning any act of arson or other violence to property owned by the state or any political subdivision.<sup>12</sup> Any person who is convicted of a commission of this offense that resulted in the mobilization or action of any law enforcement officer or any state or local agency, may be required by the court to pay restitution for all of the costs and damages arising from the criminal conduct.<sup>13</sup>

### **Effect of the Bill**

The bill makes it a third degree felony for a person to threaten to commit a crime of violence with the intent to cause, or with reckless disregard for causing:

- Terror;<sup>14</sup> or
- The evacuation of a building, place of assembly, or facility of public transportation.

A violation is punishable as a second degree felony, if the violation:

- Causes the occupants of a building, place of assembly, or facility of public transportation to be diverted from their normal or customary operations;

---

<sup>7</sup> s. 838.021, F.S.

<sup>8</sup> s. 838.021(3)(a), F.S.

<sup>9</sup> A third degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine. ss. 775.082 and 775.083, F.S.

<sup>10</sup> s. 838.021(3)(b), F.S.

<sup>11</sup> "Weapon of mass destruction" is defined as (1) any device or object that is designed or intended to cause death or serious bodily injury to any human or animal, or severe emotional or mental harm to any human, through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors; (2) any device or object involving a biological agent; (3) any device or object that is designed or intended to release radiation or radioactivity at a level dangerous to human or animal life; or (4) any biological agent, toxin, vector, or delivery system. s. 790.166(a), F.S.

<sup>12</sup> s. 790.164, F.S.

<sup>13</sup> s. 790.164(4)(d), F.S.

<sup>14</sup> "Terror" is defined as "a very strong feeling of fear." MERRIAM-WEBSTER, *Terror*, <http://www.merriam-webster.com/dictionary/terror> (last visited Nov. 9, 2015). In Alabama, Georgia, and Kansas, which have statutes criminalizing a threat to commit violence with the purpose of terrorizing another, courts have rejected arguments that such statutes are unconstitutionally vague and overbroad. *Lansdell v. State*, 25 So.3d 1169 (Ala. Crim. App. 2007); *Lanthrip v. State*, 218 S.E.2d 771 (Ga. 1975); and *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (Kan. 1972).

- Involves a threat against instructional personnel, a law enforcement officer, state attorney or assistant state attorney, firefighter, judge or elected official; or
- Involves a threat against a family member of instructional personnel, a law enforcement officer, state attorney or assistant state attorney, firefighter, judge or elected official.

A person who is convicted of a violation shall, in addition to any other restitution or penalty provided by law, pay restitution for all costs and damages caused by an evacuation resulting from the criminal conduct.

The bill provides the following definitions:

- "Family member of a person" means:
  - An individual related to the person by blood or marriage;
  - An individual living in the person's household or having the same legal residence as the person;
  - An individual who is engaged to be married to the person, or who holds himself or herself out as, or is generally known as, an individual whom the person intends to marry; or
  - An individual to whom the person stands in loco parentis.<sup>15</sup>
- "Instructional personnel" is defined in accordance with s. 1012.01, F.S.<sup>16</sup>
- "Law enforcement officer" means a current or former:
  - Law enforcement officer, correctional officer, correctional probation officer, part-time law enforcement officer, part-time correctional officer, part-time correctional probation officer, auxiliary law enforcement officer, auxiliary correctional officer, or auxiliary correctional probation officer, as those terms are respectively defined in s. 943.10, or county probation officer;
  - Employee or agent of the Department of Corrections who supervises or provides services to inmates;
  - Officer of the Florida Commission on Offender Review;
  - Federal law enforcement officer as defined in s. 901.1505; or
  - Law enforcement personnel of the Fish and Wildlife Conservation Commission or the Department of Law Enforcement.

#### B. SECTION DIRECTORY:

Section 1. Creates s. 836.12, F.S., relating to terroristic threats.

Section 2. Provides an effective date of July 1, 2016.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state government revenues.

##### 2. Expenditures:

<sup>15</sup> "In loco parentis" means "in the place of a parent." MERRIAM-WEBSTER, *In Loco Parentis*, <http://www.merriam-webster.com/dictionary/in%20loco%20parentis> (last visited Nov. 9, 2015).

<sup>16</sup> "Instructional personnel" means any K-12 staff member whose function includes the provision of direct instructional services to students. The term also includes K-12 personnel whose functions provide direct support in the learning process of students. s. 1012.01(2), F.S.

The Criminal Justice Impact Conference (CJIC) met on October 28, 2015, and determined that this bill will have a positive insignificant prison bed impact on the Department (i.e., an increase of ten or fewer beds).

According to the CJIC, there are currently several statutes with similar penalties. For example, s. 836.10, F.S. contains a second degree felony for written threats to kill or do bodily harm. In Fiscal Year 2014-2015, 51 offenders were sentenced for this offense and 13 received a prison sentence (mean sentence length was 50.4 months). Also, s. 790.162, F.S., makes it a second degree felony for threatening to throw, project, place, or discharge any destructive device. In Fiscal Year 2014-2015, 14 offenders were sentenced for this offense and one received a prison sentence (mean sentence length was 14.0 months).

Additionally, s. 790.163, F.S., contains a second degree felony for a false report about planting a bomb, explosive, or weapon of mass destruction, and s. 790.164, F.S., contains a second degree felony for a false report against state-owned property. In Fiscal Year 2014-2015, 24 offenders were sentenced for a false report about planting an explosive and four received a prison sentence (mean sentence length was 27.0 months). One offender was sentenced, but did not receive a prison sentence, for a false report against state-owned property.

In Fiscal Year 2014-2015, the incarceration rate for an unranked, 3rd degree felony was 9.9 percent and for an unranked, second degree felony was 26.7 percent.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

#### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, section 18 of the Florida Constitution because it is a criminal law.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create the need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On November 17, 2015, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute:

- Added and clarified definitions;
- Revised the prohibition in the bill to apply to threats to commit a crime of violence with intent to cause, or reckless disregard for causing terror or the evacuation of a public building, place of assembly, or facility of public transportation; and
- Clarified the requirement for persons convicted under the bill to pay restitution.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

A bill to be entitled

An act relating to terroristic threats; creating s. 836.12, F.S.; providing definitions; providing that a person commits the crime of terroristic threats if he or she threatens to commit a crime of violence under certain circumstances; providing criminal penalties; requiring payment of restitution; providing an effective date.

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

Section 1. Section 836.12, Florida Statutes, is created to read:

836.12 Terroristic threats.-

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

(a) "Facility of public transportation" means a public conveyance and any area, structure, or device which is used to support, guide, control, permit, or facilitate the movement, starting, stopping, takeoff, landing, or servicing of a public conveyance, or the loading or unloading of passengers, freight, or goods. For purposes of this paragraph, the term "public conveyance" includes a passenger or freight train, airplane, bus, truck, car, boat, tramway, gondola, lift, elevator, escalator, or other device used for the public carriage of persons or property.

(b) "Family member of a person" means:



27        1. An individual related to the person by blood or  
28 marriage;

29        2. An individual living in the person's household or  
30 having the same legal residence as the person;

31        3. An individual who is engaged to be married to the  
32 person, or who holds himself or herself out as, or is generally  
33 known as, an individual whom the person intends to marry; or

34        4. An individual to whom the person stands in loco  
35 parentis.

36        (c) "Instructional personnel" has the same meaning as  
37 provided in s. 1012.01.

38        (d) "Law enforcement officer" means a current or former:

39        1. Law enforcement officer, correctional officer,  
40 correctional probation officer, part-time law enforcement  
41 officer, part-time correctional officer, part-time correctional  
42 probation officer, auxiliary law enforcement officer, auxiliary  
43 correctional officer, or auxiliary correctional probation  
44 officer, as those terms are respectively defined in s. 943.10,  
45 or county probation officer;

46        2. Employee or agent of the Department of Corrections who  
47 supervises or provides services to inmates;

48        3. Officer of the Florida Commission on Offender Review;

49        4. Federal law enforcement officer as defined in s.  
50 901.1505; or

51        5. Law enforcement personnel of the Fish and Wildlife  
52 Conservation Commission or the Department of Law Enforcement.

53           (2) It is unlawful for a person to threaten to commit a  
 54 crime of violence with the intent to cause, or with reckless  
 55 disregard for the risk of causing:

56           (a) Terror; or

57           (b) The evacuation of a building, place of assembly, or  
 58 facility of public transportation.

59           (3) Except as provided in subsection (4), a person who  
 60 violates subsection (2) commits a felony of the third degree,  
 61 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

62           (4) A person who violates subsection (2) commits a felony  
 63 of the second degree, punishable as provided in s. 775.082, s.  
 64 775.083, or s. 775.084, if the violation:

65           (a) Causes the occupants of a building, place of assembly,  
 66 or facility of public transportation to be diverted from their  
 67 normal or customary operations;

68           (b) Involves a threat against instructional personnel, a  
 69 law enforcement officer, state attorney or assistant state  
 70 attorney, firefighter, judge, or elected official; or

71           (c) Involves a threat against a family member of a person  
 72 identified in paragraph (b).

73           (5) A person convicted of violating subsection (2) shall,  
 74 in addition to any other restitution or penalty provided by law,  
 75 pay restitution for all costs and damages caused by an  
 76 evacuation resulting from the criminal conduct.

77           Section 2. This act shall take effect July 1, 2016.



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	—	(Y/N)
ADOPTED AS AMENDED	—	(Y/N)
ADOPTED W/O OBJECTION	—	(Y/N)
FAILED TO ADOPT	—	(Y/N)
WITHDRAWN	—	(Y/N)
OTHER	_____	

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1 Committee/Subcommittee hearing bill: Judiciary Committee  
 2 Representative Pritchett offered the following:

**Amendment**

5 Remove lines 69-70 and insert:  
 6 school administrator, school bus driver, law enforcement  
 7 officer, state attorney, public defender, statewide prosecutor,  
 8 Attorney General, criminal conflict and civil regional counsel,  
 9 firefighter, judge, or elected official; or





## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 393 Estates

**SPONSOR(S):** Insurance & Banking Subcommittee; Civil Justice Subcommittee; Berman

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/CS/CS/SB 540

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Robinson	Bond
2) Insurance & Banking Subcommittee	12 Y, 0 N, As CS	Bauer	Luczynski
3) Judiciary Committee		Robinson 	Havlicak 

### SUMMARY ANALYSIS

The Florida Probate Code and the Florida Trust Code govern the disposition and management of estates during a person's lifetime or after their death. This bill amends these codes to:

- Codify the common law situs rule which provides that the disposition of real property located in Florida is governed by Florida law regardless of any contrary directive in a will.
- Provide additional guidance to lawyers and the courts regarding the circumstances under which a trustee may pay attorney's fees and costs from trust assets in breach of trust proceedings.

The bill does not appear to have a fiscal impact on state or local governments. The bill may have a positive impact on the private sector.

The bill has an effective date of July 1, 2016.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Disposition of Real Property in Probate

"Lex loci rei sitae," or the situs rule, is the fundamental legal principle that real property is governed by the law of the jurisdiction in which it is situated. The situs rule is based upon the rationale that the situs jurisdiction has the greatest interest in controlling the administration of real property located within its borders.<sup>1</sup> As early as the nineteenth century, the Florida Supreme Court affirmed the application of the situs rule in this state:

[I]t is the universal rule that the laws of the state where [the property] is situated furnish the rules for its descent, alienation, and transfer, the construction and validity of conveyances thereof, and the capacity of the parties to such contracts and conveyances, as well as their rights under the same.<sup>2</sup>

Under the Florida Probate Code, chs. 731-735, F.S., intestate<sup>3</sup> succession of real property located in Florida is explicitly governed by Florida law, regardless of whether the decedent owner was a resident or non-resident of the state, in accordance with the common law situs rule.<sup>4</sup> In regard to testamentary dispositions of Florida real property by non-residents, s. 731.106(2), F.S. provides in pertinent part:

When a nonresident decedent, whether or not a citizen of the United States, provides by will that the testamentary disposition of tangible or intangible personal property having a situs within this state, or of real property in this state, shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law.

As it relates to the disposition of Florida real property by non-residents, s. 731.106(2), F.S., merely restates the long standing common law principle of "lex loci rei sitae," while acknowledging the realities of multijurisdictional estate planning. However, construing this provision of law as a matter of first impression, the First District Court of Appeal in *Saunders v. Saunders* concluded that the statute was a restraint, rather than codification, of "lex loci rei sitae."<sup>5</sup> The court held that Florida law applies to the disposition of a non-resident testator's Florida real property only when explicitly provided by such testator's will.<sup>6</sup> Where the will is silent, the court found that the law of the non-resident decedent's domicile governs.<sup>7</sup> The holding of the court is directly at odds with the consistent and longstanding approach of Florida courts endorsing the situs rule.<sup>8</sup> Rules of statutory construction presume that no change in the common law is intended unless the statute is explicit; and inference and implication cannot be substituted for clear expression.

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<sup>1</sup> The situs rule has been justified on several additional grounds: the situs state has a strong interest in regulating the manner in which real estate is used and developed; there is a compelling interest in insuring that title and ownership interests in situs land be regular and predictable; the situs state has a clear interest in land as a source of public revenue, since real property taxation is premised on the accurate identification and description of ownership interests in land; and the situs state is best situated to resolve disputes and enforce legal decisions pertaining to local property, and can best do so when it implements local legal policy. Michael S. Finch, *Choice-of-Law and Property* 26 STETSON L. REV. 257 (1996).

<sup>2</sup> *Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 48 (Fla. 1899).

<sup>3</sup> Any part of the estate of a decedent not effectively disposed of by will. s. 732.101, F.S.

<sup>4</sup> s. 732.101, F.S.; See also *Estate of Salathe v. Schula*, 703 So. 2d 1167, 1168 (Fla. 2d DCA 1997).

<sup>5</sup> *Saunders v. Saunders*, 796 So. 2d 1253, 1254 (Fla. 1st DCA 2001).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *Connor v. Elliott*, 85 So. 164, 165 (Fla. 1920); *Kyle v. Kyle*, 128 So. 2d 427 (Fla. 2d DCA 1961); *Denison v. Denison*, 658 So. 2d 581 (Fla. 4th DCA 1995); *Beale v. Beale*, 807 So. 2d 797, 798 (Fla. 1st DCA 2002).

## Effect of Proposed Changes

The bill creates s. 731.1055, F.S., to provide that the disposition of real property in this state, whether testate or intestate, is governed by laws of this state in accordance with the common law "situs" rule.

The bill also makes conforming changes to s. 731.106, F.S.

## Trusts

The "Florida Trust Code", ch. 736, F.S., governs the creation and administration of trusts. A "trust" is generally defined as a fiduciary relationship<sup>9</sup> with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person.<sup>10</sup> A trust involves three interest holders: the "settlor"<sup>11</sup> who establishes the trust; the "trustee"<sup>12</sup> who holds legal title to the property for the benefit of the beneficiary; and lastly, the "beneficiary"<sup>13</sup> who has an equitable interest in property held subject to the trust.

Trusts are created for many purposes including, but not limited to, the protection of property and beneficiaries, tax planning, and professional management of assets.

## Attorney's Fees and Costs in Breach of Trust Proceedings

A trustee may be involved in legal proceedings relating to the trust. When legal proceedings are instituted, a trustee may retain counsel and pay attorney fees and costs from the assets of the trust.<sup>14</sup> Payment of such costs and fees may be made without the approval of any person, including trust beneficiaries, and without prior court authorization.<sup>15</sup>

### *Breach of Trust*

A trustee's broad authority to pay legal fees incurred in connection with the trust administration from trust assets is not without limitation, however, in proceedings involving a breach of trust.

The Trust Code requires a trustee to administer a trust "in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with [the] code,"<sup>16</sup> and also imposes a duty of loyalty upon the trustee.<sup>17</sup> A trustee's violation of a duty owed to a beneficiary is a breach of trust.<sup>18</sup> Breaches of trust can include: undervaluing trust assets,<sup>19</sup> failure to obtain a surety bond,<sup>20</sup> failure to render accountings to the beneficiaries,<sup>21</sup> failure to disperse monies pursuant to the settlor's wishes,<sup>22</sup> improperly favoring one beneficiary over another,<sup>23</sup> and failure to prosecute claims of the trust

<sup>9</sup> *Brundage v. Bank of America*, 996 So. 2d 877, 882 (Fla. 4th DCA 2008) (trustee owes a fiduciary duty to settlor/beneficiary).

<sup>10</sup> 55A FLA. JUR.2D *Trusts* § 1.

<sup>11</sup> "Settlor" means a person, including a testator, who creates or contributes property to a trust. s. 736.0103(18), F.S.

<sup>12</sup> "Trustee" means the original trustee and includes any additional trustee, any successor trustee, and any cotrustee. s. 736.0103(23), F.S.

<sup>13</sup> "Beneficiary" means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. s. 736.0103(4), F.S.

<sup>14</sup> s. 736.0816(20), F.S.

<sup>15</sup> s. 736.0802(10), F.S.

<sup>16</sup> s. 736.0801, F.S.

<sup>17</sup> s. 736.0802(1), F.S.

<sup>18</sup> s. 736.1001(1), F.S.

<sup>19</sup> *McCormick v. Cox*, 118 So. 3d 980, 986 (Fla. 3d DCA 2013).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; *Corya v. Sanders*, 155 So. 3d 1279, 1283-84 (Fla. 4th DCA 2015).

<sup>22</sup> *Kritchman v. Volk*, 152 So. 3d 628, 632 (Fla. 3d DCA 2014).

<sup>23</sup> s. 736.0803, F.S.

or defend claims against the trust.<sup>24</sup> Beneficiaries of the trust have standing to initiate causes of action in equity for breaches of trust unless the beneficiary has consented to or ratified the action, released the trustee of liability for such action,<sup>25</sup> or the claim is otherwise barred by statute.<sup>26</sup>

#### *Attorney's Fees and Costs in Breach of Trust Proceedings*

If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee must provide prior written notice of any intention to pay its attorney's fees and costs from the trust assets to qualified beneficiaries.<sup>27</sup> The notice must inform the beneficiary of the right to obtain an order prohibiting the payment of fees and costs.<sup>28</sup> The notice must be delivered by any commercial delivery service requiring a signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules of Civil Procedure for service of process.<sup>29</sup>

Upon the motion of a qualified beneficiary whose share of the trust may be affected by such payment, the court may preclude a trustee from paying its attorney fees and costs from the trust assets.<sup>30</sup> The beneficiary must make a reasonable showing by evidence in the record, or by proffering evidence, that a reasonable basis exists for a court to conclude that there has been a breach of trust. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court must enter an order prohibiting the payment of attorney's fees and costs from the assets of the trust. The order must also provide for the refund of attorney's fees or costs paid before an order was entered on the motion.<sup>31</sup> If a refund is not made as directed by the court, the court may, among other sanctions, strike defenses or pleadings filed by the trustee.<sup>32</sup>

If a claim or defense based upon a breach of trust is later withdrawn, dismissed, or resolved in favor of the trustee, the trustee may pay costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization or notice to the beneficiaries.<sup>33</sup>

Leading practitioners have identified several areas in which the provisions governing the payment of attorney's fees and costs in breach of trust proceedings fail to provide direction to lawyers and the court, including:<sup>34</sup>

- The circumstances under which the limitations on the payment of attorney's fees and costs are triggered.
- The categories of attorney's fees and costs subject to limitation.

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<sup>24</sup> s. 736.0811, F.S.

<sup>25</sup> John Grimsley, 18 FLA. PRAC., Law of Trusts § 8:4 (2012), John Bourbeau et al, *Breach of Trust Action Against Trustee*, 55A FLA. JUR 2D Trusts § 235 (2015), George Gleason Bogert et al, *Action be Beneficiary Against Express Trustee*, THE LAW OF TRUSTS AND TRUSTEES § 951 (2015); s. 736.1012, F.S.; See also *Anderson v. Northrop*, 12 So. 318, 324 (Fla. 1892).

<sup>26</sup> s. 736.1008, F.S.

<sup>27</sup> "Qualified beneficiary" means a living beneficiary who, on the date of the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal; would be a distributee or permissible distributee of trust income or principal if the interests of other actual or permissible distributees terminated on that date without causing the trust to terminate; or would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date. s. 736.0103(16), F.S.

<sup>28</sup> s. 736.0802(10), F.S.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper Regarding a Trustee's Use of Trust Assets to Pay Attorney's Fees and Costs in Connection with Claim or Defense of Breach of Trust* (on file with the Civil Justice Subcommittee, Florida House of Representatives).



- The circumstances under which the trustee must serve notice of an intention to pay attorney's fees and costs from trust assets and the consequences, if any, of paying such fees and costs prior to serving notice.
- Whether a trustee may use trust assets to pay its attorney's fees and costs upon a final determination in its favor by the trial court or must wait until the conclusion of any appellate proceeding.
- The type of showing required to preclude a trustee from using trust assets to pay its attorney's fees and cost, and the type of evidence that may be used to make or rebut such a showing.

### **Effect of Proposed Changes – Attorney Fees and Costs in Trust Proceedings**

The bill substantially amends s. 736.0802(10), F.S., to provide additional guidance to lawyers and the courts regarding the payment of attorney's fees and costs from trust assets in breach of trust proceedings. Specifically, the bill:

- Provides that the limitation on the general authority of a trustee to pay attorney's fees and costs from trust assets applies only to the payment of attorney's fees and costs incurred in connection with a claim or defense of breach of trust that is set forth in a filed pleading. The bill defines "pleading" as a pleading recognized by the Florida Rules of Civil Procedure.<sup>35</sup>
- Requires that the notice of intent to pay attorney's fees and costs also identify the judicial proceeding in which the claim or defense of breach of trust has been made.
- Authorizes a trustee to serve the notice of intent to pay attorney's fees and costs in the manner provided for service of pleadings and other documents under the Florida Rules of Civil Procedure<sup>36</sup> if the court has already acquired jurisdiction over the party in the proceeding. Additionally, the bill waives service of the notice of intent upon a qualified beneficiary whose identity or location is unknown to, and not reasonably ascertainable by, the trustee.
- Provides that if a trustee pays attorney's fees and costs from trust assets prior to serving the notice of intent, any affected qualified beneficiary is entitled to an order compelling the return of the payment with interest at the statutory rate.<sup>37</sup> The court must award attorney's fees and costs in connection with a motion to compel under such circumstances.
- Identifies the categories of evidence through which a movant may show, or through which a trustee may rebut, that a reasonable basis exists to conclude there has been a breach of trust. Permissible evidence consists of affidavits, answers to interrogatories, admissions, depositions, and any evidence otherwise admissible under the Florida Evidence Code.<sup>38</sup>
- Requires that payments made after service of the notice of intent be returned to the trust with interest at the statutory rate if ordered by the court.

<sup>35</sup> Fla. R. Civ. Procedure 1.100(a) provides: "There shall be a complaint or, when so designated by a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a crossclaim if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned as a third-party defendant; and a third-party answer if a third-party complaint is served. If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance. No other pleadings shall be allowed."

<sup>36</sup> Such service may be made by e-mail, mail, hand delivery, fax, or by deposit with the clerk of court if no address is known. See Fla. R. Civ. Pro. 1.080(a) and Fla. R. Jud. Admin. 2.516.

<sup>37</sup> The Chief Financial Officer is required to set the rate of interest payable on judgments and decrees on December 1, March 1, June 1, and September 1 of each year for the following applicable quarter. The current rate is 4.75%. FLORIDA DEPARTMENT OF FINANCIAL SERVICES, <http://www.myfloridacfo.com/Division/AA/Vendors/> (last visited Nov. 11, 2015).

<sup>38</sup> ch. 90, F.S.

- Provides that if the claim or defense of breach of trust is withdrawn, dismissed, or resolved by the trial court without a determination that the trustee committed a breach of trust, the trustee may pay attorney's fees and costs from trust assets without court authorization or serving a notice of intent. Further, the attorney's fees and costs that the trustee may pay under such circumstances include those payments that the trustee may have been previously compelled to return.

The bill also makes conforming changes to ss. 736.0816 and 736.1007, F.S.

#### B. SECTION DIRECTORY:

Section 1 creates s. 731.1055, F.S., relating to disposition of real property.

Section 2 amends s. 731.106, F.S., relating to assets of nondomiciliaries.

Section 3 amends s. 736.0802, F.S., relating to duty of loyalty.

Section 4 amends s. 736.0816, F.S., relating to specific powers of trustee.

Section 5 amends s. 736.1007, F.S., relating to trustee's attorney's fees.

Section 6 provides an effective date of July 1, 2016.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill's clarification of attorney fees incurred in connection with breach of trust cases may have a positive impact on the private sector.

#### D. FISCAL COMMENTS:

None.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments

2. Other:

None.

#### **B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On November 18, 2015, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments made technical revisions to the bill.

On January 13, 2016, the Insurance & Banking Subcommittee considered and adopted one amendment and reported the bill favorably as a committee substitute. The amendment removed sections 3 and 4 of the bill, relating to non-judicial modification of trusts, to restore current law in ss. 736.0105 and 736.0412, F.S. This analysis is drafted to the committee substitute as passed by the Insurance & Banking Subcommittee.

1 A bill to be entitled  
2 An act relating to estates; creating s. 731.1055,  
3 F.S.; providing that the validity and the effect of a  
4 specified disposition of real property be determined  
5 by Florida law; amending s. 731.106, F.S.; conforming  
6 provisions to changes made by the act; amending s.  
7 736.0802, F.S.; defining the term "pleading";  
8 authorizing a trustee to pay attorney fees and costs  
9 from the assets of the trust without specified  
10 approval or court authorization in certain  
11 circumstances; requiring the trustee to serve a  
12 written notice of intent upon each qualified  
13 beneficiary of the trust before the payment is made;  
14 requiring the notice to contain specified information  
15 and to be served in a specified manner; providing that  
16 specified qualified beneficiaries are entitled to an  
17 order compelling the refund of a specified payment to  
18 the trust; requiring the court to award specified  
19 attorney fees and costs; authorizing the court to  
20 prohibit a trustee from using trust assets to make a  
21 specified payment; authorizing the court to enter an  
22 order compelling the return of specified attorney fees  
23 and costs to the trust with interest at the statutory  
24 rate; requiring the court to deny a specified motion  
25 unless the court finds a reasonable basis to conclude  
26 that there has been a breach of trust; authorizing a

27 court to deny the motion for good cause; authorizing  
 28 the movant to show that a reasonable basis exists, and  
 29 a trustee to rebut the showing, through specified  
 30 means; authorizing the court to impose remedies or  
 31 sanctions; authorizing a trustee to use trust assets  
 32 in a specified manner if a claim or defense of breach  
 33 of trust is withdrawn, dismissed, or judicially  
 34 resolved in a trial court without a determination that  
 35 the trustee has committed a breach of trust; providing  
 36 construction; amending ss. 736.0816 and 736.1007,  
 37 F.S.; conforming provisions to changes made by the  
 38 act; providing an effective date.

39  
 40 Be It Enacted by the Legislature of the State of Florida:

41  
 42 Section 1. Section 731.1055, Florida Statutes, is created  
 43 to read:

44 731.1055 Disposition of real property.—The validity and  
 45 effect of a disposition, whether intestate or testate, of real  
 46 property in this state shall be determined by Florida law.

47 Section 2. Subsection (2) of section 731.106, Florida  
 48 Statutes, is amended to read:

49 731.106 Assets of nondomiciliaries.—

50 (2) When a nonresident decedent, whether or not a citizen  
 51 of the United States, provides by will that the testamentary  
 52 disposition of tangible or intangible personal property having a

53 situs within this state, ~~or of real property in this state,~~  
54 shall be construed and regulated by the laws of this state, the  
55 validity and effect of the dispositions shall be determined by  
56 Florida law. The court may, and in the case of a decedent who  
57 was at the time of death a resident of a foreign country the  
58 court shall, direct the personal representative appointed in  
59 this state to make distribution directly to those designated by  
60 the decedent's will as beneficiaries of the tangible or  
61 intangible property or to the persons entitled to receive the  
62 decedent's personal estate under the laws of the decedent's  
63 domicile.

64 Section 3. Subsection (10) of section 736.0802, Florida  
65 Statutes, is amended to read:

66 736.0802 Duty of loyalty.—

67 (10) Unless otherwise provided in this subsection, payment  
68 of costs or attorney ~~attorney's~~ fees incurred in any proceeding  
69 ~~from the assets of the trust~~ may be made by a the trustee from  
70 assets of the trust without the approval of any person and  
71 without court authorization, ~~unless the court orders otherwise~~  
72 as provided in ss. 736.0816(20) and 736.1007(1) paragraph (b).

73 (a) As used in this subsection, the term "pleading" means  
74 a pleading as defined in Rule 1.100 of the Florida Rules of  
75 Civil Procedure.

76 (b) If a trustee incurs attorney fees or costs in  
77 connection with a claim or defense of breach of trust which is  
78 made in a filed pleading, the trustee may pay such attorney fees

79 or costs from trust assets without the approval of any person  
80 and without any court authorization. However, the trustee must  
81 serve a written notice of intent upon each qualified beneficiary  
82 of the trust whose share of the trust may be affected by the  
83 payment before such payment is made. The notice of intent need  
84 not be served upon a qualified beneficiary whose identity or  
85 location is unknown to, and not reasonably ascertainable by, the  
86 trustee.

87 (c) The notice of intent must identify the judicial  
88 proceeding in which the claim or defense of breach of trust has  
89 been made in a filed pleading and must inform the person served  
90 of his or her right under paragraph (e) to apply to the court  
91 for an order prohibiting the trustee from using trust assets to  
92 pay attorney fees or costs as provided in paragraph (b) or  
93 compelling the return of such attorney fees and costs to the  
94 trust. The notice of intent must be served by any commercial  
95 delivery service or form of mail requiring a signed receipt; the  
96 manner provided in the Florida Rules of Civil Procedure for  
97 service of process; or, as to any party over whom the court has  
98 already acquired jurisdiction in that judicial proceeding, in  
99 the manner provided for service of pleadings and other documents  
100 by the Florida Rules of Civil Procedure.

101 (d) If a trustee has used trust assets to pay attorney  
102 fees or costs described in paragraph (b) before service of a  
103 notice of intent, any qualified beneficiary who is not barred  
104 under s. 736.1008 and whose share of the trust may have been

105 affected by such payment is entitled, upon the filing of a  
106 motion to compel the return of such payment to the trust, to an  
107 order compelling the return of such payment, with interest at  
108 the statutory rate. The court shall award attorney fees and  
109 costs incurred in connection with the motion to compel as  
110 provided in s. 736.1004.

111 (e) Upon the motion of any qualified beneficiary who is  
112 not barred under s. 736.1008 and whose share of the trust may be  
113 affected by the use of trust assets to pay attorney fees or  
114 costs as provided in paragraph (b), the court may prohibit the  
115 trustee from using trust assets to make such payment and, if  
116 such payment has been made from trust assets after service of a  
117 notice of intent, the court may enter an order compelling the  
118 return of the attorney fees and costs to the trust, with  
119 interest at the statutory rate. In connection with any hearing  
120 on a motion brought under this paragraph:

121 1. The court shall deny the motion unless it finds a  
122 reasonable basis to conclude that there has been a breach of  
123 trust. If the court finds there is a reasonable basis to  
124 conclude there has been a breach of trust, the court may still  
125 deny the motion if it finds good cause to do so.

126 2. The movant may show that such reasonable basis exists,  
127 and the trustee may rebut any such showing, by presenting  
128 affidavits, answers to interrogatories, admissions, depositions,  
129 and any evidence otherwise admissible under the Florida Evidence  
130 Code.



131 (f) If a trustee fails to comply with an order of the  
 132 court prohibiting the use of trust assets to pay attorney fees  
 133 or costs described in paragraph (b) or fails to comply with an  
 134 order compelling that such payment be refunded to the trust, the  
 135 court may impose such remedies or sanctions as the court deems  
 136 appropriate, including, without limitation, striking the  
 137 defenses or pleadings filed by the trustee.

138 (g) Notwithstanding the entry of an order prohibiting the  
 139 use of trust assets to pay attorney fees and costs as provided  
 140 in paragraph (b), or compelling the return of such attorney fees  
 141 or costs, if a claim or defense of breach of trust is withdrawn,  
 142 dismissed, or judicially resolved in the trial court without a  
 143 determination that the trustee has committed a breach of trust,  
 144 the trustee may use trust assets to pay attorney fees and costs  
 145 as provided in paragraph (b) and may do so without service of a  
 146 notice of intent or order of the court. The attorney fees and  
 147 costs may include fees and costs that were refunded to the trust  
 148 pursuant to an order of the court.

149 (h) This subsection does not limit proceedings under s.  
 150 736.0206 or remedies for breach of trust under s. 736.1001 or  
 151 the right of any interested person to challenge or object to the  
 152 payment of compensation or costs from the trust.

153 ~~(a) If a claim or defense based upon a breach of trust is~~  
 154 ~~made against a trustee in a proceeding, the trustee shall~~  
 155 ~~provide written notice to each qualified beneficiary of the~~  
 156 ~~trust whose share of the trust may be affected by the payment of~~

157 ~~attorney's fees and costs of the intention to pay costs or~~  
158 ~~attorney's fees incurred in the proceeding from the trust prior~~  
159 ~~to making payment. The written notice shall be delivered by~~  
160 ~~sending a copy by any commercial delivery service requiring a~~  
161 ~~signed receipt, by any form of mail requiring a signed receipt,~~  
162 ~~or as provided in the Florida Rules of Civil Procedure for~~  
163 ~~service of process. The written notice shall inform each~~  
164 ~~qualified beneficiary of the trust whose share of the trust may~~  
165 ~~be affected by the payment of attorney's fees and costs of the~~  
166 ~~right to apply to the court for an order prohibiting the trustee~~  
167 ~~from paying attorney's fees or costs from trust assets. If a~~  
168 ~~trustee is served with a motion for an order prohibiting the~~  
169 ~~trustee from paying attorney's fees or costs in the proceeding~~  
170 ~~and the trustee pays attorney's fees or costs before an order is~~  
171 ~~entered on the motion, the trustee and the trustee's attorneys~~  
172 ~~who have been paid attorney's fees or costs from trust assets to~~  
173 ~~defend against the claim or defense are subject to the remedies~~  
174 ~~in paragraphs (b) and (c).~~

175 ~~(b) If a claim or defense based upon breach of trust is~~  
176 ~~made against a trustee in a proceeding, a party must obtain a~~  
177 ~~court order to prohibit the trustee from paying costs or~~  
178 ~~attorney's fees from trust assets. To obtain an order~~  
179 ~~prohibiting payment of costs or attorney's fees from trust~~  
180 ~~assets, a party must make a reasonable showing by evidence in~~  
181 ~~the record or by proffering evidence that provides a reasonable~~  
182 ~~basis for a court to conclude that there has been a breach of~~

183 ~~trust. The trustee may proffer evidence to rebut the evidence~~  
184 ~~submitted by a party. The court in its discretion may defer~~  
185 ~~ruling on the motion, pending discovery to be taken by the~~  
186 ~~parties. If the court finds that there is a reasonable basis to~~  
187 ~~conclude that there has been a breach of trust, unless the court~~  
188 ~~finds good cause, the court shall enter an order prohibiting the~~  
189 ~~payment of further attorney's fees and costs from the assets of~~  
190 ~~the trust and shall order attorney's fees or costs previously~~  
191 ~~paid from assets of the trust to be refunded. An order entered~~  
192 ~~under this paragraph shall not limit a trustee's right to seek~~  
193 ~~an order permitting the payment of some or all of the attorney's~~  
194 ~~fees or costs incurred in the proceeding from trust assets,~~  
195 ~~including any fees required to be refunded, after the claim or~~  
196 ~~defense is finally determined by the court. If a claim or~~  
197 ~~defense based upon a breach of trust is withdrawn, dismissed, or~~  
198 ~~resolved without a determination by the court that the trustee~~  
199 ~~committed a breach of trust after the entry of an order~~  
200 ~~prohibiting payment of attorney's fees and costs pursuant to~~  
201 ~~this paragraph, the trustee may pay costs or attorney's fees~~  
202 ~~incurred in the proceeding from the assets of the trust without~~  
203 ~~further court authorization.~~

204 ~~(c) If the court orders a refund under paragraph (b), the~~  
205 ~~court may enter such sanctions as are appropriate if a refund is~~  
206 ~~not made as directed by the court, including, but not limited~~  
207 ~~to, striking defenses or pleadings filed by the trustee. Nothing~~  
208 ~~in this subsection limits other remedies and sanctions the court~~

209 ~~may employ for the failure to refund timely.~~

210 ~~(d) Nothing in this subsection limits the power of the~~  
 211 ~~court to review fees and costs or the right of any interested~~  
 212 ~~persons to challenge fees and costs after payment, after an~~  
 213 ~~accounting, or after conclusion of the litigation.~~

214 ~~(e) Notice under paragraph (a) is not required if the~~  
 215 ~~action or defense is later withdrawn or dismissed by the party~~  
 216 ~~that is alleging a breach of trust or resolved without a~~  
 217 ~~determination by the court that the trustee has committed a~~  
 218 ~~breach of trust.~~

219 Section 4. Subsection (20) of section 736.0816, Florida  
 220 Statutes, is amended to read:

221 736.0816 Specific powers of trustee.—Except as limited or  
 222 restricted by this code, a trustee may:

223 (20) Employ persons, including, but not limited to,  
 224 attorneys, accountants, investment advisers, or agents, even if  
 225 they are the trustee, an affiliate of the trustee, or otherwise  
 226 associated with the trustee, to advise or assist the trustee in  
 227 the exercise of any of the trustee's powers and pay reasonable  
 228 compensation and costs incurred in connection with such  
 229 employment from the assets of the trust, subject to s.  
 230 736.0802(10) with respect to attorney fees and costs, and act  
 231 without independent investigation on the recommendations of such  
 232 persons.

233 Section 5. Subsection (1) of section 736.1007, Florida  
 234 Statutes, is amended to read:

235           736.1007 Trustee's attorney ~~attorney's~~ fees.-  
 236           (1) If the trustee of a revocable trust retains an  
 237 attorney to render legal services in connection with the initial  
 238 administration of the trust, the attorney is entitled to  
 239 reasonable compensation for those legal services, payable from  
 240 the assets of the trust, subject to s. 736.0802(10), without  
 241 court order. The trustee and the attorney may agree to  
 242 compensation that is determined in a manner or amount other than  
 243 the manner or amount provided in this section. The agreement is  
 244 not binding on a person who bears the impact of the compensation  
 245 unless that person is a party to or otherwise consents to be  
 246 bound by the agreement. The agreement may provide that the  
 247 trustee is not individually liable for the attorney ~~attorney's~~  
 248 fees and costs.  
 249           Section 6. This act shall take effect July 1, 2016.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 747 Digital Assets  
**SPONSOR(S):** Fant  
**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/CS/SB 494

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Malcolm	Bond
2) Insurance & Banking Subcommittee	11 Y, 1 N	Yaffe	Luczynski
3) Judiciary Committee		Malcolm	Havlicak

### SUMMARY ANALYSIS

The bill creates the Florida Fiduciary Access to Digital Assets Act to provide specified fiduciaries, specifically the personal representative of a decedent, an agent under a power of attorney, a guardian, or a trustee, with the ability to access the digital assets of the decedent, principal, or ward. Digital assets include electronic communications and records such as emails, text messages, online photographs, documents stored on the cloud, electronic bank statements, and other electronic communications or records.

In general, the bill provides that a fiduciary will have access to a catalogue of the user's communications (the "outside of the envelope") but not the content (the "inside of the envelope"), unless the user consented to the disclosure of the content of the communication.

The bill may have an indeterminate negative fiscal impact on state expenditures. The bill does not appear to have a fiscal impact on local governments.

The bill provides an effective date of July 1, 2016.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Current Situation**

Many documents and records that once existed in tangible form, such as letters, contracts, and financial and bank statements, are being replaced by intangible digital assets<sup>1</sup> that are not readily discoverable or accessible. Substantial amounts of valuable electronic data and digital assets are acquired and stored in cell phones, computers, online accounts, and other devices. Consequently, a family member or personal representative often faces substantial challenges when trying to identify, locate, or access the digital assets of a deceased or incapacitated person.

This switch to digital assets raises a number of issues: Upon an account holder's death or incapacity, how does a fiduciary identify and locate that person's digital assets? Who then has control or ownership? How is an account accessed when no one has the decedent's password? Does the original terms-of-service agreement control whether a fiduciary may gain access to an account?

Resolution of these issues require balancing the fiduciary's duty to identify and access the digital assets with the Internet Service Provider's (ISP) duty to protect the original account holder's privacy in accordance with state and federal computer security laws. An additional barrier may exist in the terms-of-service agreement that the original account holder agreed to when initiating a contract with the ISP.

##### **Electronic Communication Laws**

###### ***Federal Law***

Federal laws prohibit the unauthorized access of both computer systems and certain types of protected data. The Stored Communications Act<sup>2</sup> (SCA) establishes privacy rights and prohibits certain electronic communication services or remote computing services from knowingly divulging the contents of certain electronic communications and files. An ISP is prohibited from voluntarily divulging the contents of stored communications unless an exception applies under the SCA. However, a "lawful consent" exception allows an ISP to voluntarily disclose electronic communications if lawful consent is given.<sup>3</sup>

The privacy protections in the SCA are viewed by some as being substantial barriers for family members and fiduciaries who seek to access the contents of a deceased or incapacitated user's online accounts.<sup>4</sup> The ISPs see them as restrictions on their ability to disclose electronic communications to anyone, unless certain exceptions are met. Their reasoning is that if the SCA applies, the ISP is prohibited from disclosing the contents of the communications and files.<sup>5</sup>

The Computer Fraud and Abuse Act<sup>6</sup> (CFAA) is designed to protect computers in which there is a federal interest from certain threats and forms of espionage and from being used to commit fraud.<sup>7</sup> The

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<sup>1</sup> Some examples of digital assets are e-mail, photos, projects, online bank accounts, personal records, digital music, entertainment, presentations, domain names, intellectual property, and client lists. The assets are generally important because of their sentimental or financial value.

<sup>2</sup> 18 U.S.C. s. 2701 *et seq.*

<sup>3</sup> 18 U.S.C. s. 2702(b)(c).

<sup>4</sup> James D. Lamm, Digital Passing: *Your Client is Six Feet Under, But His Data is in the Cloud*, Nov. 2014, 12 (on file with the Civil Justice Subcommittee).

<sup>5</sup> *Id.*

<sup>6</sup> 18 U.S.C. s. 1030, *et seq.*

<sup>7</sup> Charles Doyle, Congressional Research Service, *Cybercrime: A Sketch of 18 U.S.C. 1030 and Related Federal Criminal Laws*, 1 (Oct. 15, 2014).



law imposes penalties for the unauthorized access of stored data, devices, and computer hardware.<sup>8</sup> The Department of Justice has stated that the CFAA is broad enough in scope to permit the federal government to prosecute a person who violates the access terms of a web site's terms-of-service agreement or usage policies.<sup>9</sup>

### **State Law**

Chapter 815, F.S., the "Florida Computer Crimes Act," and ch. 934, F.S., related to security of communications surveillance, address computer related crimes and the security of communications. These provisions are modeled after the federal SCA. Like the SCA, neither provision addresses the ability of a fiduciary to legally access, duplicate, or control digital assets.<sup>10</sup>

### **The Model Uniform Law**

Believing that legislation was needed to ensure that account holders and their fiduciaries retain control of digital property, the Uniform Law Commission developed and adopted the Uniform Fiduciary Access to Digital Assets Act in July 2014. Versions of the model act were introduced in numerous state legislatures in 2015. The Uniform Law Commission reconvened in 2015 to readdress the issue and produced a revised version of the model act for 2016. The bill is a state adaptation of the Revised Uniform Fiduciary Access to Digital Access Act, referred to as the Revised UFADAA.

### **Effect of the Bill**

The bill creates ch. 740, F.S., consisting of ss. 740.001-740.09, F.S., the "Florida Fiduciary Access to Digital Assets Act," (Act) to provide fiduciaries with the authority to access, control, or copy digital assets and accounts. The Act only applies to four types of fiduciaries: personal representatives, guardians, agents acting pursuant to a power of attorney, and trustees. These fiduciaries are already bound to comply with existing fiduciary duties. The provisions of the Act do not extend to family members or others who seek access to the digital assets unless they are a fiduciary.

The bill is also limited by the definition of "digital asset." The Act only applies to an electronic record in which an individual has a right or interest, and does not apply to the underlying asset or liability unless the asset or liability is itself an electronic record.<sup>11</sup>

### **Definitions (Section 3)**

The bill creates s. 740.002, F.S., to define terms used in the Act. The majority of the terms are found in the Florida Probate Code and the Florida Power of Attorney Act, while others are adapted from federal statutes or the Revised UFADAA. Below are some of the most frequently used new terms in the bill:

- An "account" is as an arrangement under a terms-of-service agreement in which the custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user;
- "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person;

<sup>8</sup> William Bissett and David Kauffman, *Surf the Evolving Web of Laws Affecting Digital Assets*, 41 Estate Planning No. 4 (Apr. 2014).

<sup>9</sup> Lamm, *supra* note 4, at 10.

<sup>10</sup> The Real Property, Probate, & Trust Law Section of The Florida Bar, *White Paper: Proposed Enactment of Chapter 740, Florida Statutes*, 2, (2015) (on file with the Civil Justice Subcommittee).

<sup>11</sup> "Digital assets include electronically-stored information, such as: 1) any information stored on a computer and other digital devices; 2) content uploaded onto websites, ranging from photos to documents; and 3) rights in digital property, such as domain names or digital entitlements associated with online games. Both the catalogue and content of an electronic communication are covered by the term 'digital assets.'" *Id.* at 7.

- “Content of an electronic communication” is defined to mean information concerning the substance of an electronic communication which has been sent or received by a user; is in electronic storage, or carried or maintained by a custodian; and, is not readily accessible to the public;<sup>12</sup>
- A “custodian” is defined as a person that carries, maintains, processes, receives, or stores a digital asset of a user, such as an ISP;
- A “designated recipient” is defined as a person chosen by a user through an online tool to administer digital assets of the user;
- A “digital asset” is defined as a record that is electronic but does not include the underlying asset or liability unless the asset or liability is a record that is electronic<sup>13</sup>;
- “Electronic communication” has the same meaning as provided in federal law<sup>14</sup>; and
- “Online tool” means an electronic service provided by a custodian that allows the user, in an agreement separate and distinct from the terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person.

#### **A User’s Direction for Disclosure of Digital Assets (Section 4)**

The bill creates s. 740.003, F.S., to establish a user’s ability to direct disclosure of the user’s digital assets and the order of preference for his or her direction. It is a three-tiered priority system.

The first priority is a user’s online direction for a specific account. If a company provides an online tool for a user to designate a person to have access to his or her account upon death or incapacity, and the user takes advantage of the online tool, then the user’s designation prevails over a contrary provision in the user’s will or trust provided that the online tool allows the user to modify or delete a direction at any time. The user may direct the custodian to disclose or not disclose some or all of his or her digital assets, even the content of electronic communications.

The second priority is the user’s direction contained in a valid will, trust, power of attorney, or other record if the user has not used an online tool to give direction or the custodian has not provided an online tool. If the user makes plans for disposing of his or her digital assets, then the law gives effect to that plan and the custodian of the digital assets is required to comply with the plan.

The third priority is the terms-of-service agreement that governs the account. If the user does not provide for the disposition of his or her digital assets, whether via an online tool or in an estate plan, the terms-of-service governing the account control.

#### **Terms-of-Service Agreement is Preserved (Section 5)**

The bill creates s. 740.004, F.S., to provide that a terms-of-service agreement<sup>15</sup> is preserved and the fiduciary has no greater rights than the user has under the terms-of-service agreement. However, a fiduciary’s access to digital assets may be modified or eliminated by a user, federal law, or by a terms-of-service agreement if the user has not provided direction under newly-created s. 740.003, F.S.

<sup>12</sup> In lay terms, this is generally understood to be the “inside of an envelope” or the subject line of an e-mail, the body of an e-mail or attachment, or the body of other types of electronic communications.

<sup>13</sup> Based on this definition, a fiduciary’s access to a digital asset does not mean that the fiduciary is entitled to “own” or otherwise engage in transactions with the asset; rather, the fiduciary has access to the electronically-stored information that constitutes the “digital asset.” *White Paper, supra* note 10, at 7.

<sup>14</sup> See 18 U.S.C. § 2510(12) (“Electronic communication” means “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include: any wire or oral communication; any communication made through a tone-only paging device; any communication from a tracking device; electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.”).

<sup>15</sup> A “terms-of-service agreement” is defined in the bill as “an agreement that controls the relationship between a user and a custodian.”

## **Procedure for Custodians When Disclosing Assets (Section 6)**

Section 740.005, F.S., is created to provide three options to a custodian for disclosing digital assets. When a custodian discloses a user's digital assets, the custodian may:

- allow the fiduciary or designated recipient full access to the user's account;
- allow the fiduciary or designated recipient partial access to the account that is sufficient to perform necessary tasks; or
- provide the fiduciary or designated recipient with a copy in a record of the digital asset that the user could have accessed if he or she were alive.

If a user directs or a fiduciary requests a custodian to disclose some, but not all of the user's digital assets, the custodian is not required to disclose the assets if segregating the assets would be unduly burdensome. If the custodian believes that an undue burden exists, the custodian or the fiduciary may seek a court order to disclose:

- a subset of the user's digital assets;
- all of the digital assets to the fiduciary or designated recipient, or to the court for a review in chambers; or
- none of the user's digital assets.

A custodian may charge a reasonable administrative fee for the cost of disclosing digital assets, and a custodian is not required to disclose a digital asset that a user has deleted.

## **Four Types of Fiduciaries Covered (Sections 7—14)**

The bill creates ss. 740.006-740.04, F.S., to establish the rights of a personal representative, guardian, agent acting pursuant to a power of attorney, or trustee to access a user's digital assets. In general, fiduciaries will have access to a catalogue of the user's communications (the "outside of the envelope") but not the content (the "inside of the envelope"), unless the user consented to the disclosure of the content of the communication. Because the fiduciary has the same authority as the deceased user (no more and no less), the fiduciary is "authorized" by the deceased user as required under the two federal statutes (the SCA and CFAA) that prohibit unauthorized access.<sup>16</sup>

## **Disclosure of the Content of Electronic Communications of a Deceased User (Section 7)**

The bill creates s. 740.006, F.S., to establish the rights of a personal representative of a decedent to access the contents of an electronic communication of the user (the "inside of the envelope").<sup>17</sup> A personal representative may not access the contents of a decedent's electronic communications unless the user consented to or a court directs such access.

A custodian must disclose the content of an electronic communication if the personal representative provides:

- a written request for disclosure;
- a certified copy of the user's death certificate;
- a certified copy of the letters of administration or similar specified authority;
- a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications unless the user provided direction in an online tool; and
- if the custodian requests, the personal representative must provide specified information that will identify the user's account, evidence linking the account to the user; or a finding by the court that the user had a specific account with the custodian; that disclosure of the contents would not violate the SCA or other federal law relating to privacy of telecommunication carriers' customer

<sup>16</sup> *White Paper*, *supra* note 10, at 3.

<sup>17</sup> Newly-created s. 740.007, F.S., addresses disclosure of non-content and other digital assets of a deceased user.

information; that the user consented to disclosure of the content; or disclosure of the content is reasonably necessary for the administration of the estate.

### ***Disclosure of Other Digital Assets of a Deceased User (Section 8)***

Section 740.007, F.S., is created to provide a personal representative default access to the catalogue, or "outside of the envelope," of electronic communications and other digital assets that are not protected by federal privacy laws.<sup>18</sup> A personal representative is permitted to access all of a decedent's other digital assets, excluding the contents of electronic communications, unless the deceased user prohibited disclosure or a court orders otherwise. The custodian must disclose a catalog of the user's electronic communications and the user's digital assets of the user if the personal representative provides:

- a written request for disclosure;
- a certified copy of the user's death certificate;
- a certified copy of the letters of administration or similar specified authority; and
- if the custodian requests, the personal representative must provide information that will identify the user's account; evidence linking the account to the user; an affidavit stating that disclosure is reasonably necessary for the administration of the estate; or a court order finding that the user had an account with the custodian or that disclosure of the digital assets is reasonably necessary for the administration of the estate.

### ***Disclosure of Content of Electronic Communications of a Principal (Section 9)***

The bill creates s. 740.008, F.S., to provide that an agent acting pursuant to a power of attorney may access the contents of a principal's electronic communications if the authority is expressly granted by the principal and is not otherwise restricted by the principal or a court. The custodian is required to disclose the contents if the agent provides:

- a written request for disclosure;
- an original or copy of the power of attorney in which the authority over the content is expressly granted to the agent;
- a certification by the agent that the power of attorney is in effect; and
- if requested by the custodian, information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

### ***Disclosure of Other Digital Assets of a Principal (Section 10)***

Section 740.009, F.S., is created to provide that an agent acting pursuant to a power of attorney granting specific authority over the digital assets or granting general authority to act on behalf of the principal may access a catalog of the principal's electronic communications and the principal's digital assets, but not the content of electronic communications, unless otherwise ordered by a court, directed by the principal, or provided by a power of attorney. The custodian is required to disclose the digital assets if the agent provides:

- a written request for disclosure;
- an original or a copy of the power of attorney which grants the agent specific authority over digital assets or general authority to act on behalf of the principal;
- a certification by the agent that the power of attorney is in effect; and
- if requested by the custodian, identifying information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

<sup>18</sup> See "Electronic Communication Laws" section above.

### ***Disclosure of Digital Assets held in Trust when the Trustee is the Original User (Section 11)***

The bill creates s. 740.01, F.S., to provide that a trustee who is an original user may access any digital assets that are held in the trust, including the catalogue and the content of electronic communications, unless it is otherwise ordered by a court or provided in the trust.

### ***Disclosure of Content of Electronic Communications Held in Trust When a Trustee is not the Original User (Section 12)***

The bill creates s. 740.02, F.S., to provide that a trustee, who is not an original user, may access the content of an electronic communication that was sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trust instrument consents to the disclosure of the content to the trustee. A trustee's access may be limited by court order, at the direction of the user, or by the trust instrument. The custodian is required to disclose the contents if the agent provides:

- a written request for disclosure;
- a certified copy of the trust instrument or a certification of trust which includes consent to disclosure of the content to the trustee;
- a certification by the trustee that the trust exists and the trustee is a currently acting trustee; and
- if requested by the custodian, certain identifying information assigned by the custodian to identify the trust's account or evidence linking the account to the trust.

### ***Disclosure of Other Digital Assets Held in Trust When the Trustee is not the Original User (Section 13)***

The bill creates s. 740.03, F.S., to provide that unless prohibited by a court, the user, or the trust instrument, a trustee who is not the original user may access the catalog of electronic communications and any digital assets, except the content of electronic communications, in an account of the trust. The trustee must supply the custodian with:

- a written request for disclosure;
- a certified copy of the trust instrument or a certification of trust;
- a certification by the trustee that the trust exists and that the trustee is a currently acting trustee; and
- if requested by the custodian, specified information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

### ***Disclosure of Digital Assets to a Guardian of a Ward (Section 14)***

Section 740.04, F.S., is created to provide that a guardian is not authorized to access the contents of a ward's electronic communications unless the ward expressly grants consent to do so. A guardian is permitted, however, to access the ward's other digital assets pursuant to letters of guardianship or a court order, unless directed otherwise by a court or the user. The guardian must provide the custodian with:

- a written request for disclosure;
- a certified copy of letters of plenary guardianship of the property or the court order giving the guardian authority over the digital assets of the ward; and
- if requested by the custodian, specified information assigned by the custodian to identify the ward's account or evidence linking the account to the ward.

A custodian of the ward's digital assets may suspend or terminate the ward's account for good cause if requested to do so by a guardian with general authority to manage the ward's property. The request to suspend or terminate must be accompanied by a certified copy of the court order giving the guardian the authority over the ward's property.

## **Fiduciary Duty and Authority (Section 15)**

Section 740.05, F.S., establishes the legal duties of a fiduciary charged with managing digital assets. This includes the duties of care, loyalty, and confidentiality. Section 740.05(2), F.S., establishes the fiduciary's authority to exercise control over the digital assets in conjunction with other statutes. The fiduciary's authority is:

- subject to the terms-of-service agreement, except as directed in the online tool;
- subject to other laws, including copyright law;
- limited by the scope of the fiduciary's duties; and
- may not be used to impersonate the user.

A fiduciary who has authority over the tangible personal property of a decedent, ward, principal, or settlor has the right to access any digital asset in which those persons had or has a right or interest if the digital asset is not held by a custodian or subject to a terms-of-service agreement. For purposes of any applicable computer fraud or unauthorized computer access laws, a fiduciary who acts within the scope of the fiduciary's duties is an authorized user of the property. A fiduciary who has authority over the tangible personal property of a decedent, ward, principal, or settlor has the right to access the property and any digital assets that are stored in it and is an authorized user for the purpose of computer fraud and unauthorized computer access laws.

A custodian is authorized to disclose information in an account to a user's fiduciary if the information is required to terminate an account used to access digital assets licensed to the user.

A fiduciary who requests that a custodian terminate a user's account must submit the request in writing, along with:

- a certified copy of the death certificate of the user, if the user is deceased;
- a certified copy of the letters of administration or other specified court orders; and
- if requested by the custodian, specified information assigned by the custodian to identify the ward's account or evidence linking the account to the ward, or a court finding that the user had a specific account with the custodian, identifiable by certain enumerated information.

## **Custodian Compliance and Immunity (Section 16)**

The bill creates s. 740.06, F.S., to provide that a custodian has 60 days to comply with a request from a fiduciary or designated recipient to disclose digital assets or to terminate an account. If the custodian does not comply, the fiduciary or designated representative may seek a court order directing compliance. An order directing compliance must contain a finding that compliance would not be in violation of 18 U.S.C. s. 2702, related to the disclosure of electronic communications or records.

A custodian may deny a request for disclosure or termination if the custodian is aware of any lawful access to the account after the custodian receives the fiduciary's request. The bill does not limit a custodian's ability to require a fiduciary or designated recipient from obtaining a court order that specifies that an account belongs to the ward or principal, specifies that there is sufficient consent from the ward or principal, and contains any findings required by law other than those required in the Act.

A custodian and its officers, employees, and agents are immune from liability for acts or omissions done in good faith in compliance with the Act.

## **Electronic Signatures in Global and National Commerce Act (Section 17)**

Section 740.07, F.S., is created to establish the relationship between the Act and the federal Electronic Signatures in Global and National Commerce Act,<sup>19</sup> noting where this Act does and does not modify, limit, or supersede federal law.

## **Applicability of the Act (Section 18)**

Section 740.08, F.S., created by the bill, provides that the powers granted by the Act to a fiduciary, personal representative, guardian, trustee, or agent applies regardless of whether such person's authority arose on, before, or after July 1, 2016 (the effective date of the bill). The bill also provides that the Act applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

The bill does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

## **Severability (Section 19)**

Section 740.09, F.S., is created to provide a severability provision that provides that if any provision is held invalid, the other provisions of the Act will remain in effect.

## **Effective Date (Section 20)**

The bill provides an effective date of July 1, 2016.

## **B. SECTION DIRECTORY:**

Section 1 creates ch. 740, F.S., consisting of ss. 740.001-740.09, F.S., to be entitled "Fiduciary Access to Digital Assets."

Section 2 creates s. 740.001, F.S., relating to the short title.

Section 3 creates s. 740.002, F.S., relating to definitions.

Section 4 creates s. 740.003, F.S., relating to user direction for disclosure of digital assets.

Section 5 creates s. 740.004, F.S., relating to terms-of-service agreement preserved.

Section 6 creates s. 740.005, F.S., relating to procedure for disclosing digital assets.

Section 7 creates s. 740.006, F.S., relating to disclosure of content of electronic communications of deceased user.

Section 8 creates s. 740.007, F.S., relating to disclosure of other digital assets of deceased user.

Section 9 creates s. 740.008, F.S., relating to disclosure of content of electronic communications of principal.

Section 10 creates s. 740.009, F.S., relating to disclosure of other digital assets of principal.

<sup>19</sup> The Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. ss. 7001 et seq., is designed "to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically." Bureau of Consumer Protection, Federal Trade Commission and National Telecommunications and Information Administration, Department of Commerce, *Report to Congress: Electronic Signatures in Global and National Commerce Act, The Consumer Consent Provision in Section 101(c)(1)(C)(ii)*, i (June 2001) [www.ntia.doc.gov/files/ntia/publications/esign7.pdf](http://www.ntia.doc.gov/files/ntia/publications/esign7.pdf) (last visited Dec. 14, 2015).

Section 11 creates s. 740.01, F.S., relating to disclosure of digital assets held in trust when trustee is the original user.

Section 12 creates s. 740.02, F.S., relating to disclosure of content of electronic communications held in trust when trustee is not the original user.

Section 13 creates s. 740.03, F.S., relating to disclosure of other digital assets held in trust when trustee is not the original user.

Section 14 creates s. 740.04, F.S., relating to disclosure of digital assets to guardian of ward.

Section 15 creates s. 740.05, F.S., relating to fiduciary duty and authority.

Section 16 creates s. 740.06, F.S., relating to custodian compliance and immunity.

Section 17 creates s. 740.07, F.S., relating to relation to Electronic Signatures in Global and National Commerce Act.

Section 18 creates s. 740.08, F.S., relating to applicability.

Section 19 creates s. 740.09, F.S., relating to severability.

Section 20 provides an effective date of July 1, 2016.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

#### **2. Expenditures:**

Provisions in the bill allowing application to the circuit courts for orders directing compliance, requests for disclosures segregating assets, assertions by custodians claiming selective disclosures impose an undue burden, and determinations requiring in camera review may increase the expenditure of judicial time and resources. However, these matters will be case-specific and any corresponding increase in judicial time or court workload is indeterminate.<sup>20</sup>

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

#### **2. Expenditures:**

The bill does not appear to have any impact on local government expenditures.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill does not appear to have any direct economic impact on the private sector.

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<sup>20</sup> Office of the State Courts Administrator, 2016 Judicial Impact Statement, SB 494, p. 2 (Nov. 12, 2015) (on file with the Civil Justice Subcommittee).



D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The preemption doctrine is a principle of law which holds that federal laws take precedence over state laws, and as such, states may not enact laws that are inconsistent with the federal law. Under the Electronic Communications Privacy Act, or ECPA, a service provider, with few exceptions, may not divulge the contents of a communication without the "lawful consent" of the originator, addressee, intended recipient, or the subscriber.<sup>21</sup> Under the provisions of this bill, an online tool is created and controlled by the ISP that is separate from the terms of service agreement. This online tool allows the account holder or user to specifically "opt in" and grant permission to the fiduciary to access his or her digital assets. This affirmative act may be deemed to trigger the "lawful consent" exception to ECPA thus appearing to avoid conflict with the ECPA.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.

1                   A bill to be entitled  
2           An act relating to digital assets; providing a  
3           directive to the Division of Law Revision and  
4           Information; creating s. 740.001, F.S.; providing a  
5           short title; creating s. 740.002, F.S.; defining  
6           terms; creating s. 740.003, F.S.; authorizing a user  
7           to use an online tool to allow a custodian to disclose  
8           or to prohibit a custodian from disclosing digital  
9           assets under certain circumstances; providing that  
10          specified user's direction overrides a contrary  
11          provision in a terms-of-service agreement under  
12          certain circumstances; creating s. 740.004, F.S.;  
13          providing construction; authorizing the modification  
14          of a fiduciary's assets under certain circumstances;  
15          creating s. 740.005, F.S.; providing procedures for  
16          the disclosure of digital assets; creating s. 740.006,  
17          F.S.; requiring a custodian to disclose the content of  
18          electronic communications of a deceased user under  
19          certain circumstances; creating s. 740.007, F.S.;  
20          requiring a custodian to disclose other digital assets  
21          of a deceased user under certain circumstances;  
22          creating s. 740.008, F.S.; requiring a custodian to  
23          disclose the content of electronic communications of a  
24          principal under certain circumstances; creating s.  
25          740.009, F.S.; requiring a custodian to disclose other  
26          digital assets of a principal under certain

27        circumstances; creating s. 740.01, F.S.; requiring a  
 28        custodian to disclose to a trustee who is the original  
 29        user the digital assets held in trust under certain  
 30        circumstances; creating s. 740.02, F.S.; requiring a  
 31        custodian to disclose to a trustee who is not the  
 32        original user the content of electronic communications  
 33        held in trust under certain circumstances; creating s.  
 34        740.03, F.S.; requiring a custodian to disclose to a  
 35        trustee who is not the original user other digital  
 36        assets under certain circumstances; creating s.  
 37        740.04, F.S.; authorizing the court to grant a  
 38        guardian the right to access a ward's digital assets  
 39        under certain circumstances; requiring a custodian to  
 40        disclose to a guardian a specified catalog of  
 41        electronic communications and specified digital assets  
 42        of a ward under certain circumstances; creating s.  
 43        740.05, F.S.; imposing fiduciary duties; providing for  
 44        the rights and responsibilities of certain  
 45        fiduciaries; creating s. 740.06, F.S.; requiring  
 46        compliance of a custodian; providing construction;  
 47        providing for immunity from liability for a custodian  
 48        and its officers, employees, and agents acting in good  
 49        faith in complying with their duties; creating s.  
 50        740.07, F.S.; providing construction; creating s.  
 51        740.08, F.S.; providing applicability; creating s.  
 52        740.09, F.S.; providing severability; providing an

53 effective date.

54

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

56

57 Section 1. The Division of Law Revision and Information is  
 58 directed to create chapter 740, Florida Statutes, consisting of  
 59 ss. 740.001-740.09, Florida Statutes, to be entitled "Fiduciary  
 60 Access to Digital Assets."

61 Section 2. Section 740.001, Florida Statutes, is created  
 62 to read:

63 740.001 Short title.—This chapter may be cited as the  
 64 "Florida Fiduciary Access to Digital Assets Act."

65 Section 3. Section 740.002, Florida Statutes, is created  
 66 to read:

67 740.002 Definitions.—As used in this chapter, the term:

68 (1) "Account" means an arrangement under a terms-of-  
 69 service agreement in which the custodian carries, maintains,  
 70 processes, receives, or stores a digital asset of the user or  
 71 provides goods or services to the user.

72 (2) "Agent" means a person that is granted authority to  
 73 act for a principal under a durable or nondurable power of  
 74 attorney, whether denominated an agent, an attorney in fact, or  
 75 otherwise. The term includes an original agent, a co-agent, and  
 76 a successor agent.

77 (3) "Carries" means to engage in the transmission of  
 78 electronic communications.

79           (4) "Catalog of electronic communications" means  
 80 information that identifies each person with which a user has  
 81 had an electronic communication, the time and date of the  
 82 communication, and the electronic address of the person.

83           (5) "Content of an electronic communication" means  
 84 information concerning the substance or meaning of the  
 85 communication which:

86           (a) Has been sent or received by a user;

87           (b) Is in electronic storage by a custodian providing an  
 88 electronic communication service to the public or is carried or  
 89 maintained by a custodian providing a remote computing service  
 90 to the public; and

91           (c) Is not readily accessible to the public.

92           (6) "Court" means a circuit court of this state.

93           (7) "Custodian" means a person that carries, maintains,  
 94 processes, receives, or stores a digital asset of a user.

95           (8) "Designated recipient" means a person chosen by a user  
 96 through an online tool to administer digital assets of the user.

97           (9) "Digital asset" means an electronic record in which an  
 98 individual has a right or interest. The term does not include an  
 99 underlying asset or liability unless the asset or liability is  
 100 itself an electronic record.

101           (10) "Electronic" means relating to technology having  
 102 electrical, digital, magnetic, wireless, optical,  
 103 electromagnetic, or similar capabilities.

104           (11) "Electronic communication" has the same meaning as

105 provided in 18 U.S.C. s. 2510(12).

106 (12) "Electronic communication service" means a custodian  
 107 that provides to a user the ability to send or receive an  
 108 electronic communication.

109 (13) "Fiduciary" means an original, additional, or  
 110 successor personal representative, guardian, agent, or trustee.

111 (14) "Guardian" means a person who is appointed by the  
 112 court as guardian of the property of a minor or an incapacitated  
 113 individual. The term includes an original guardian, a co-  
 114 guardian, and a successor guardian, as well as a person  
 115 appointed by the court as an emergency temporary guardian of the  
 116 property.

117 (15) "Information" means data, text, images, videos,  
 118 sounds, codes, computer programs, software, databases, or the  
 119 like.

120 (16) "Online tool" means an electronic service provided by  
 121 a custodian which allows the user, in an agreement distinct from  
 122 the terms-of-service agreement between the custodian and user,  
 123 to provide directions for disclosure or nondisclosure of digital  
 124 assets to a third person.

125 (17) "Person" means an individual, estate, trust, business  
 126 or nonprofit entity, public corporation, government or  
 127 governmental subdivision, agency, or instrumentality, or other  
 128 legal entity.

129 (18) "Personal representative" means the fiduciary  
 130 appointed by the court to administer the estate of a deceased

131 individual pursuant to letters of administration or an order  
 132 appointing a curator or administrator ad litem for the estate.  
 133 The term includes an original personal representative, a  
 134 copersonal representative, and a successor personal  
 135 representative, as well as a person who is entitled to receive  
 136 and collect a deceased individual's property pursuant to an  
 137 order of summary administration issued pursuant to chapter 735.

138 (19) "Power of attorney" means a record that grants an  
 139 agent authority to act in the place of a principal pursuant to  
 140 chapter 709.

141 (20) "Principal" means an individual who grants authority  
 142 to an agent in a power of attorney.

143 (21) "Record" means information that is inscribed on a  
 144 tangible medium or that is stored in an electronic or other  
 145 medium and is retrievable in perceivable form.

146 (22) "Remote computing service" means a custodian that  
 147 provides to a user computer processing services or the storage  
 148 of digital assets by means of an electronic communications  
 149 system as defined in 18 U.S.C. s. 2510(14).

150 (23) "Terms-of-service agreement" means an agreement that  
 151 controls the relationship between a user and a custodian.

152 (24) "Trustee" means a fiduciary that holds legal title to  
 153 property under an agreement, declaration, or trust instrument  
 154 that creates a beneficial interest in the settlor or other  
 155 persons. The term includes an original trustee, a cotrustee, and  
 156 a successor trustee.

157        (25) "User" means a person that has an account with a  
 158 custodian.

159        (26) "Ward" means an individual for whom a guardian has  
 160 been appointed.

161        (27) "Will" means an instrument admitted to probate,  
 162 including a codicil, executed by an individual in the manner  
 163 prescribed by the Florida Probate Code, which disposes of the  
 164 individual's property on or after his or her death. The term  
 165 includes an instrument that merely appoints a personal  
 166 representative or revokes or revises another will.

167        Section 4. Section 740.003, Florida Statutes, is created  
 168 to read:

169        740.003 User direction for disclosure of digital assets.—

170        (1) A user may use an online tool to direct the custodian  
 171 to disclose or not to disclose some or all of the user's digital  
 172 assets, including the content of electronic communications. If  
 173 the online tool allows the user to modify or delete a direction  
 174 at all times, a direction regarding disclosure using an online  
 175 tool overrides a contrary direction by the user in a will,  
 176 trust, power of attorney, or other record.

177        (2) If a user has not used an online tool to give  
 178 direction under subsection (1) or if the custodian has not  
 179 provided an online tool, the user may allow or prohibit  
 180 disclosure to a fiduciary of some or all of the user's digital  
 181 assets, including the content of electronic communications sent  
 182 or received by the user, in a will, trust, power of attorney, or



183 | other record.

184 |       (3) A user's direction under subsection (1) or subsection  
 185 | (2) overrides a contrary provision in a terms-of-service  
 186 | agreement that does not require the user to act affirmatively  
 187 | and distinctly from the user's assent to the terms of service.

188 |       Section 5. Section 740.004, Florida Statutes, is created  
 189 | to read:

190 |       740.004 Terms-of-service agreement preserved.—

191 |       (1) This chapter does not change or impair a right of a  
 192 | custodian or a user under a terms-of-service agreement to access  
 193 | and use the digital assets of the user.

194 |       (2) This chapter does not give a fiduciary any new or  
 195 | expanded rights other than those held by the user for whom, or  
 196 | for whose estate or trust, the fiduciary acts or represents.

197 |       (3) A fiduciary's access to digital assets may be modified  
 198 | or eliminated by a user, by federal law, or by a terms-of-  
 199 | service agreement if the user has not provided direction under  
 200 | s. 740.003.

201 |       Section 6. Section 740.005, Florida Statutes, is created  
 202 | to read:

203 |       740.005 Procedure for disclosing digital assets.—

204 |       (1) When disclosing the digital assets of a user under  
 205 | this chapter, the custodian may, at its sole discretion:

206 |       (a) Grant a fiduciary or designated recipient full access  
 207 | to the user's account;

208 |       (b) Grant a fiduciary or designated recipient partial

209 access to the user's account sufficient to perform the tasks  
 210 with which the fiduciary or designated recipient is charged; or  
 211 (c) Provide a fiduciary or designated recipient a copy in  
 212 a record of any digital asset that, on the date the custodian  
 213 received the request for disclosure, the user could have  
 214 accessed if the user were alive and had full capacity and access  
 215 to the account.

216 (2) A custodian may assess a reasonable administrative  
 217 charge for the cost of disclosing digital assets under this  
 218 chapter.

219 (3) A custodian is not required to disclose under this  
 220 chapter a digital asset deleted by a user.

221 (4) If a user directs or a fiduciary requests a custodian  
 222 to disclose under this chapter some, but not all, of the user's  
 223 digital assets to the fiduciary or a designated recipient, the  
 224 custodian is not required to disclose the assets if segregation  
 225 of the assets would impose an undue burden on the custodian. If  
 226 the custodian believes the direction or request imposes an undue  
 227 burden, the custodian or the fiduciary may seek an order from  
 228 the court to disclose:

229 (a) A subset limited by date of the user's digital assets;  
 230 (b) All of the user's digital assets to the fiduciary or  
 231 designated recipient, or to the court for review in chambers; or  
 232 (c) None of the user's digital assets.

233 Section 7. Section 740.006, Florida Statutes, is created  
 234 to read:

235        740.006 Disclosure of content of electronic communications  
 236 of deceased user.-If a deceased user consented to or a court  
 237 directs the disclosure of the content of electronic  
 238 communications of the user, the custodian shall disclose to the  
 239 personal representative of the estate of the user the content of  
 240 an electronic communication sent or received by the user if the  
 241 personal representative gives to the custodian:

242            (1) A written request for disclosure which is in physical  
 243 or electronic form;

244            (2) A certified copy of the death certificate of the user;

245            (3) A certified copy of the letters of administration, the  
 246 order authorizing a curator or administrator ad litem, the order  
 247 of summary administration issued pursuant to chapter 735, or  
 248 other court order;

249            (4) Unless the user provided direction using an online  
 250 tool, a copy of the user's will, trust, power of attorney, or  
 251 other record evidencing the user's consent to disclosure of the  
 252 content of electronic communications; and

253            (5) If requested by the custodian:

254            (a) A number, username, address, or other unique  
 255 subscriber or account identifier assigned by the custodian to  
 256 identify the user's account;

257            (b) Evidence linking the account to the user; or

258            (c) A finding by the court that:

259            1. The user had a specific account with the custodian,  
 260 identifiable by information specified in paragraph (a);

261        2. Disclosure of the content of electronic communications  
 262 of the user would not violate 18 U.S.C. ss. 2701 et seq., 47  
 263 U.S.C. s. 222, or other applicable law;

264        3. Unless the user provided direction using an online  
 265 tool, the user consented to disclosure of the content of  
 266 electronic communications; or

267        4. Disclosure of the content of electronic communications  
 268 of the user is reasonably necessary for the administration of  
 269 the estate.

270        Section 8. Section 740.007, Florida Statutes, is created  
 271 to read:

272        740.007 Disclosure of other digital assets of deceased  
 273 user.—Unless a user prohibited disclosure of digital assets or  
 274 the court directs otherwise, a custodian shall disclose to the  
 275 personal representative of the estate of a deceased user a  
 276 catalog of electronic communications sent or received by the  
 277 user and digital assets of the user, except the content of  
 278 electronic communications, if the personal representative gives  
 279 to the custodian:

280        (1) A written request for disclosure which is in physical  
 281 or electronic form;

282        (2) A certified copy of the death certificate of the user;

283        (3) A certified copy of the letters of administration, the  
 284 order authorizing a curator or administrator ad litem, the order  
 285 of summary administration issued pursuant to chapter 735, or  
 286 other court order; and

- 287        (4) If requested by the custodian:  
 288            (a) A number, username, address, or other unique  
 289 subscriber or account identifier assigned by the custodian to  
 290 identify the user's account;  
 291            (b) Evidence linking the account to the user;  
 292            (c) An affidavit stating that disclosure of the user's  
 293 digital assets is reasonably necessary for the administration of  
 294 the estate; or  
 295            (d) An order of the court finding that:  
 296                1. The user had a specific account with the custodian,  
 297 identifiable by information specified in paragraph (a); or  
 298                2. Disclosure of the user's digital assets is reasonably  
 299 necessary for the administration of the estate.

300        Section 9. Section 740.008, Florida Statutes, is created  
 301 to read:

302        740.008 Disclosure of content of electronic communications  
 303 of principal.—To the extent a power of attorney expressly grants  
 304 an agent authority over the content of electronic communications  
 305 sent or received by the principal and unless directed otherwise  
 306 by the principal or the court, a custodian shall disclose to the  
 307 agent the content if the agent gives to the custodian:

- 308            (1) A written request for disclosure which is in physical  
 309 or electronic form;  
 310            (2) An original or copy of the power of attorney expressly  
 311 granting the agent authority over the content of electronic  
 312 communications of the principal;

313        (3) A certification by the agent, under penalty of  
 314 perjury, that the power of attorney is in effect; and

315        (4) If requested by the custodian:

316        (a) A number, username, address, or other unique  
 317 subscriber or account identifier assigned by the custodian to  
 318 identify the principal's account; or

319        (b) Evidence linking the account to the principal.

320        Section 10. Section 740.009, Florida Statutes, is created  
 321 to read:

322        740.009 Disclosure of other digital assets of principal.-

323 Unless otherwise ordered by the court, directed by the  
 324 principal, or provided by a power of attorney, a custodian shall  
 325 disclose to an agent with specific authority over the digital  
 326 assets or with general authority to act on behalf of the  
 327 principal a catalog of electronic communications sent or  
 328 received by the principal, and digital assets of the principal,  
 329 except the content of electronic communications, if the agent  
 330 gives the custodian:

331        (1) A written request for disclosure which is in physical  
 332 or electronic form;

333        (2) An original or a copy of the power of attorney which  
 334 gives the agent specific authority over digital assets or  
 335 general authority to act on behalf of the principal;

336        (3) A certification by the agent, under penalty of  
 337 perjury, that the power of attorney is in effect; and

338        (4) If requested by the custodian:

339        (a) A number, username, address, or other unique  
 340 subscriber or account identifier assigned by the custodian to  
 341 identify the principal's account; or

342        (b) Evidence linking the account to the principal.

343        Section 11. Section 740.01, Florida Statutes, is created  
 344 to read:

345        740.01 Disclosure of digital assets held in trust when  
 346 trustee is the original user.—Unless otherwise ordered by the  
 347 court or provided in a trust, a custodian shall disclose to a  
 348 trustee that is an original user of an account any digital asset  
 349 of the account held in trust, including a catalog of electronic  
 350 communications of the trustee and the content of electronic  
 351 communications.

352        Section 12. Section 740.02, Florida Statutes, is created  
 353 to read:

354        740.02 Disclosure of content of electronic communications  
 355 held in trust when trustee is not the original user.—Unless  
 356 otherwise ordered by the court, directed by the user, or  
 357 provided in a trust, a custodian shall disclose to a trustee  
 358 that is not an original user of an account the content of an  
 359 electronic communication sent or received by an original or  
 360 successor user and carried, maintained, processed, received, or  
 361 stored by the custodian in the account of the trust if the  
 362 trustee gives the custodian:

363        (1) A written request for disclosure which is in physical  
 364 or electronic form;

365 (2) A certified copy of the trust instrument, or a  
 366 certification of trust under s. 736.1017, which includes consent  
 367 to disclosure of the content of electronic communications to the  
 368 trustee;

369 (3) A certification by the trustee, under penalty of  
 370 perjury, that the trust exists and that the trustee is a  
 371 currently acting trustee of the trust; and

372 (4) If requested by the custodian:

373 (a) A number, username, address, or other unique  
 374 subscriber or account identifier assigned by the custodian to  
 375 identify the trust's account; or

376 (b) Evidence linking the account to the trust.

377 Section 13. Section 740.03, Florida Statutes, is created  
 378 to read:

379 740.03 Disclosure of other digital assets held in trust  
 380 when trustee is not the original user.—Unless otherwise ordered  
 381 by the court, directed by the user, or provided in a trust, a  
 382 custodian shall disclose to a trustee that is not an original  
 383 user of an account, a catalog of electronic communications sent  
 384 or received by an original or successor user and stored,  
 385 carried, or maintained by the custodian in an account of the  
 386 trust and any digital assets in which the trust has a right or  
 387 interest, other than the content of electronic communications,  
 388 if the trustee gives the custodian:

389 (1) A written request for disclosure which is in physical  
 390 or electronic form;



391       (2) A certified copy of the trust instrument, or a  
 392 certification of trust under s. 736.1017;

393       (3) A certification by the trustee, under penalty of  
 394 perjury, that the trust exists and that the trustee is a  
 395 currently acting trustee of the trust; and

396       (4) If requested by the custodian:

397       (a) A number, username, address, or other unique  
 398 subscriber or account identifier assigned by the custodian to  
 399 identify the trust's account; or

400       (b) Evidence linking the account to the trust.

401       Section 14. Section 740.04, Florida Statutes, is created  
 402 to read:

403       740.04 Disclosure of digital assets to guardian of ward.—

404       (1) After an opportunity for a hearing under chapter 744,  
 405 the court may grant a guardian access to the digital assets of a  
 406 ward.

407       (2) Unless otherwise ordered by the court or directed by  
 408 the user, a custodian shall disclose to a guardian the catalog  
 409 of electronic communications sent or received by the ward and  
 410 any digital assets in which the ward has a right or interest,  
 411 other than the content of electronic communications, if the  
 412 guardian gives the custodian:

413       (a) A written request for disclosure which is in physical  
 414 or electronic form;

415       (b) A certified copy of letters of plenary guardianship of  
 416 the property or the court order that gives the guardian

417 authority over the digital assets of the ward; and  
 418 (c) If requested by the custodian:  
 419 1. A number, username, address, or other unique subscriber  
 420 or account identifier assigned by the custodian to identify the  
 421 ward's account; or  
 422 2. Evidence linking the account to the ward.  
 423 (3) A guardian with general authority to manage the  
 424 property of a ward may request a custodian of the digital assets  
 425 of the ward to suspend or terminate an account of the ward for  
 426 good cause. A request made under this section must be  
 427 accompanied by a certified copy of the court order giving the  
 428 guardian authority over the ward's property.

429 Section 15. Section 740.05, Florida Statutes, is created  
 430 to read:

431 740.05 Fiduciary duty and authority.—

432 (1) The legal duties imposed on a fiduciary charged with  
 433 managing tangible property apply to the management of digital  
 434 assets, including:

- 435 (a) The duty of care;
- 436 (b) The duty of loyalty; and
- 437 (c) The duty of confidentiality.

438 (2) A fiduciary's authority with respect to a digital  
 439 asset of a user:

- 440 (a) Except as otherwise provided in s. 740.003, is subject  
 441 to the applicable terms-of-service agreement;
- 442 (b) Is subject to other applicable law, including

443 copyright law;  
 444 (c) Is limited by the scope of the fiduciary's duties; and  
 445 (d) May not be used to impersonate the user.  
 446 (3) A fiduciary with authority over the tangible personal  
 447 property of a decedent, ward, principal, or settlor has the  
 448 right to access any digital asset in which the decedent, ward,  
 449 principal, or settlor had or has a right or interest and that is  
 450 not held by a custodian or subject to a terms-of-service  
 451 agreement.  
 452 (4) A fiduciary acting within the scope of the fiduciary's  
 453 duties is an authorized user of the property of the decedent,  
 454 ward, principal, or settlor for the purpose of applicable  
 455 computer fraud and unauthorized computer access laws, including  
 456 under chapter 815.  
 457 (5) A fiduciary with authority over the tangible personal  
 458 property of a decedent, ward, principal, or settlor:  
 459 (a) Has the right to access the property and any digital  
 460 asset stored in it; and  
 461 (b) Is an authorized user for the purpose of computer  
 462 fraud and unauthorized computer access laws, including under  
 463 chapter 815.  
 464 (6) A custodian may disclose information in an account to  
 465 a fiduciary of the user when the information is required to  
 466 terminate an account used to access digital assets licensed to  
 467 the user.  
 468 (7) A fiduciary of a user may request a custodian to

469 terminate the user's account. A request for termination must be  
 470 in writing, in paper or electronic form, and accompanied by:

471 (a) If the user is deceased, a certified copy of the death  
 472 certificate of the user;

473 (b) A certified copy of the letters of administration; the  
 474 order authorizing a curator or administrator ad litem; the order  
 475 of summary administration issued pursuant to chapter 735; or the  
 476 court order, power of attorney, or trust giving the fiduciary  
 477 authority over the account; and

478 (c) If requested by the custodian:

479 1. A number, username, address, or other unique subscriber  
 480 or account identifier assigned by the custodian to identify the  
 481 user's account;

482 2. Evidence linking the account to the user; or

483 3. A finding by the court that the user had a specific  
 484 account with the custodian, identifiable by the information  
 485 specified in subparagraph 1.

486 Section 16. Section 740.06, Florida Statutes, is created  
 487 to read:

488 740.06 Custodian compliance and immunity.—

489 (1) Not later than 60 days after receipt of the  
 490 information required under ss. 740.006-740.04, a custodian shall  
 491 comply with a request under this chapter from a fiduciary or  
 492 designated recipient to disclose digital assets or terminate an  
 493 account. If the custodian fails to comply, the fiduciary or  
 494 designated representative may apply to the court for an order

495 directing compliance.

496 (2) An order under subsection (1) directing compliance  
 497 must contain a finding that compliance is not in violation of 18  
 498 U.S.C. s. 2702.

499 (3) A custodian may notify a user that a request for  
 500 disclosure or to terminate an account was made under this  
 501 chapter.

502 (4) A custodian may deny a request under this chapter from  
 503 a fiduciary or designated representative for disclosure of  
 504 digital assets or to terminate an account if the custodian is  
 505 aware of any lawful access to the account following the receipt  
 506 of the fiduciary's request.

507 (5) This chapter does not limit a custodian's ability to  
 508 obtain or require a fiduciary or designated recipient requesting  
 509 disclosure or termination under this chapter to obtain a court  
 510 order that:

511 (a) Specifies that an account belongs to the ward or  
 512 principal;

513 (b) Specifies that there is sufficient consent from the  
 514 ward or principal to support the requested disclosure; and

515 (c) Contains a finding required by a law other than this  
 516 chapter.

517 (6) A custodian and its officers, employees, and agents  
 518 are immune from liability for an act or omission done in good  
 519 faith in compliance with this chapter.

520 Section 17. Section 740.07, Florida Statutes, is created

521 to read:

522       740.07 Relation to Electronic Signatures in Global and  
 523 National Commerce Act.—This chapter modifies, limits, and  
 524 supersedes the Electronic Signatures in Global and National  
 525 Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify,  
 526 limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c),  
 527 or authorize electronic delivery of any of the notices described  
 528 in s. 103(b) of that act, 15 U.S.C. s. 7003(b).

529       Section 18. Section 740.08, Florida Statutes, is created  
 530 to read:

531       740.08 Applicability.—

532       (1) Subject to subsection (3), this chapter applies to:

533       (a) A fiduciary acting under a will, trust, or power of  
 534 attorney executed before, on, or after July 1, 2016;

535       (b) A personal representative acting for a decedent who  
 536 died before, on, or after July 1, 2016;

537       (c) A guardian appointed through a guardianship  
 538 proceeding, whether pending in a court or commenced before, on,  
 539 or after July 1, 2016; and

540       (d) A trustee acting under a trust created before, on, or  
 541 after July 1, 2016.

542       (2) This chapter applies to a custodian if the user  
 543 resides in this state or resided in this state at the time of  
 544 the user's death.

545       (3) This chapter does not apply to a digital asset of an  
 546 employer used by an employee in the ordinary course of the

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547 employer's business.

548 Section 19. Section 740.09, Florida Statutes, is created  
549 to read:

550 740.09 Severability.—If any provision of this chapter or  
551 its application to any person or circumstance is held invalid,  
552 the invalidity does not affect other provisions or applications  
553 of this chapter which can be given effect without the invalid  
554 provision or application, and to this end the provisions of this  
555 chapter are severable.

556 Section 20. This act shall take effect July 1, 2016.



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COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

---

1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Fant offered the following:

**Amendment (with title amendment)**

Remove lines 171-503 and insert:

6 to disclose to a designated recipient or not to disclose some or  
7 all of the user's digital assets, including the content of  
8 electronic communications. If the online tool allows the user to  
9 modify or delete a direction at all times, a direction regarding  
10 disclosure using an online tool overrides a contrary direction  
11 by the user in a will, trust, power of attorney, or other  
12 record.

13 (2) If a user has not used an online tool to give  
14 direction under subsection (1) or if the custodian has not  
15 provided an online tool, the user may allow or prohibit  
16 disclosure to a fiduciary of some or all of the user's digital  
17 assets, including the content of electronic communications sent





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18 or received by the user, in a will, trust, power of attorney, or  
19 other record.

20 (3) A user's direction under subsection (1) or subsection  
21 (2) overrides a contrary provision in a terms-of-service  
22 agreement that does not require the user to act affirmatively  
23 and distinctly from the user's assent to the terms of service.

24 Section 5. Section 740.004, Florida Statutes, is created  
25 to read:

26 740.004 Terms-of-service agreement preserved.-

27 (1) This chapter does not change or impair a right of a  
28 custodian or a user under a terms-of-service agreement to access  
29 and use the digital assets of the user.

30 (2) This chapter does not give a fiduciary or a designated  
31 recipient any new or expanded rights other than those held by  
32 the user for whom, or for whose estate or trust, the fiduciary  
33 or designated recipient acts or represents.

34 (3) A fiduciary's or designated recipient's access to  
35 digital assets may be modified or eliminated by a user, by  
36 federal law, or by a terms-of-service agreement if the user has  
37 not provided direction under s. 740.003.

38 Section 6. Section 740.005, Florida Statutes, is created  
39 to read:

40 740.005 Procedure for disclosing digital assets.-

41 (1) When disclosing the digital assets of a user under  
42 this chapter, the custodian may, at its sole discretion:



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43 (a) Grant a fiduciary or designated recipient full access  
44 to the user's account;

45 (b) Grant a fiduciary or designated recipient partial  
46 access to the user's account sufficient to perform the tasks  
47 with which the fiduciary or designated recipient is charged; or

48 (c) Provide a fiduciary or designated recipient a copy in  
49 a record of any digital asset that, on the date the custodian  
50 received the request for disclosure, the user could have  
51 accessed if the user were alive and had full capacity and access  
52 to the account.

53 (2) A custodian may assess a reasonable administrative  
54 charge for the cost of disclosing digital assets under this  
55 chapter.

56 (3) A custodian is not required to disclose under this  
57 chapter a digital asset deleted by a user.

58 (4) If a user directs or a fiduciary requests a custodian  
59 to disclose under this chapter some, but not all, of the user's  
60 digital assets to the fiduciary or a designated recipient, the  
61 custodian is not required to disclose the assets if segregation  
62 of the assets would impose an undue burden on the custodian. If  
63 the custodian believes the direction or request imposes an undue  
64 burden, the custodian or the fiduciary may seek an order from  
65 the court to disclose:

66 (a) A subset limited by date of the user's digital assets;

67 (b) All of the user's digital assets to the fiduciary or  
68 designated recipient, or to the court for review in chambers; or



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69 (c) None of the user's digital assets.

70 Section 7. Section 740.006, Florida Statutes, is created  
71 to read:

72 740.006 Disclosure of content of electronic communications  
73 of deceased user.—If a deceased user consented to or a court  
74 directs the disclosure of the content of electronic  
75 communications of the user, the custodian shall disclose to the  
76 personal representative of the estate of the user the content of  
77 an electronic communication sent or received by the user if the  
78 personal representative gives to the custodian:

79 (1) A written request for disclosure which is in physical  
80 or electronic form;

81 (2) A certified copy of the death certificate of the user;

82 (3) A certified copy of the letters of administration, the  
83 order authorizing a curator or administrator ad litem, the order  
84 of summary administration issued pursuant to chapter 735, or  
85 other court order;

86 (4) Unless the user provided direction using an online  
87 tool, a copy of the user's will, trust, power of attorney, or  
88 other record evidencing the user's consent to disclosure of the  
89 content of electronic communications; and

90 (5) If requested by the custodian:

91 (a) A number, username, address, or other unique  
92 subscriber or account identifier assigned by the custodian to  
93 identify the user's account;

94 (b) Evidence linking the account to the user; or



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95 (c) A finding by the court that:

96 1. The user had a specific account with the custodian,  
97 identifiable by information specified in paragraph (a);

98 2. Disclosure of the content of electronic communications  
99 of the user would not violate 18 U.S.C. ss. 2701 et seq., 47  
100 U.S.C. s. 222, or other applicable law;

101 3. Unless the user provided direction using an online  
102 tool, the user consented to disclosure of the content of  
103 electronic communications; or

104 4. Disclosure of the content of electronic communications  
105 of the user is reasonably necessary for the administration of  
106 the estate.

107 Section 8. Section 740.007, Florida Statutes, is created  
108 to read:

109 740.007 Disclosure of other digital assets of deceased  
110 user.—Unless a user prohibited disclosure of digital assets or  
111 the court directs otherwise, a custodian shall disclose to the  
112 personal representative of the estate of a deceased user a  
113 catalog of electronic communications sent or received by the  
114 user and digital assets of the user, except the content of  
115 electronic communications, if the personal representative gives  
116 to the custodian:

117 (1) A written request for disclosure which is in physical  
118 or electronic form;

119 (2) A certified copy of the death certificate of the user;



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120 (3) A certified copy of the letters of administration, the  
121 order authorizing a curator or administrator ad litem, the order  
122 of summary administration issued pursuant to chapter 735, or  
123 other court order; and

124 (4) If requested by the custodian:

125 (a) A number, username, address, or other unique  
126 subscriber or account identifier assigned by the custodian to  
127 identify the user's account;

128 (b) Evidence linking the account to the user;

129 (c) An affidavit stating that disclosure of the user's  
130 digital assets is reasonably necessary for the administration of  
131 the estate; or

132 (d) An order of the court finding that:

133 1. The user had a specific account with the custodian,  
134 identifiable by information specified in paragraph (a); or

135 2. Disclosure of the user's digital assets is reasonably  
136 necessary for the administration of the estate.

137 Section 9. Section 740.008, Florida Statutes, is created  
138 to read:

139 740.008 Disclosure of content of electronic communications  
140 of principal.—To the extent a power of attorney expressly grants  
141 an agent authority over the content of electronic communications  
142 sent or received by the principal and unless directed otherwise  
143 by the principal or the court, a custodian shall disclose to the  
144 agent the content if the agent gives to the custodian:



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145 (1) A written request for disclosure which is in physical  
146 or electronic form;

147 (2) An original or copy of the power of attorney expressly  
148 granting the agent authority over the content of electronic  
149 communications of the principal;

150 (3) A certification by the agent, under penalty of  
151 perjury, that the power of attorney is in effect; and

152 (4) If requested by the custodian:

153 (a) A number, username, address, or other unique  
154 subscriber or account identifier assigned by the custodian to  
155 identify the principal's account; or

156 (b) Evidence linking the account to the principal.

157 Section 10. Section 740.009, Florida Statutes, is created  
158 to read:

159 740.009 Disclosure of other digital assets of principal.-  
160 Unless otherwise ordered by the court, directed by the  
161 principal, or provided by a power of attorney, a custodian shall  
162 disclose to an agent with specific authority over the digital  
163 assets or with general authority to act on behalf of the  
164 principal a catalog of electronic communications sent or  
165 received by the principal, and digital assets of the principal,  
166 except the content of electronic communications, if the agent  
167 gives the custodian:

168 (1) A written request for disclosure which is in physical  
169 or electronic form;



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170       (2) An original or a copy of the power of attorney which  
171 gives the agent specific authority over digital assets or  
172 general authority to act on behalf of the principal;

173       (3) A certification by the agent, under penalty of  
174 perjury, that the power of attorney is in effect; and

175       (4) If requested by the custodian:

176       (a) A number, username, address, or other unique  
177 subscriber or account identifier assigned by the custodian to  
178 identify the principal's account; or

179       (b) Evidence linking the account to the principal.

180       Section 11. Section 740.01, Florida Statutes, is created  
181 to read:

182       740.01 Disclosure of digital assets held in trust when  
183 trustee is the original user.—Unless otherwise ordered by the  
184 court or provided in a trust, a custodian shall disclose to a  
185 trustee that is an original user of an account any digital asset  
186 of the account held in trust, including a catalog of electronic  
187 communications of the trustee and the content of electronic  
188 communications.

189       Section 12. Section 740.02, Florida Statutes, is created  
190 to read:

191       740.02 Disclosure of content of electronic communications  
192 held in trust when trustee is not the original user.—Unless  
193 otherwise ordered by the court, directed by the user, or  
194 provided in a trust, a custodian shall disclose to a trustee  
195 that is not an original user of an account the content of an



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196 electronic communication sent or received by an original or  
197 successor user and carried, maintained, processed, received, or  
198 stored by the custodian in the account of the trust if the  
199 trustee gives the custodian:

200 (1) A written request for disclosure which is in physical  
201 or electronic form;

202 (2) A certified copy of the trust instrument, or a  
203 certification of trust under s. 736.1017, which includes consent  
204 to disclosure of the content of electronic communications to the  
205 trustee;

206 (3) A certification by the trustee, under penalty of  
207 perjury, that the trust exists and that the trustee is a  
208 currently acting trustee of the trust; and

209 (4) If requested by the custodian:

210 (a) A number, username, address, or other unique  
211 subscriber or account identifier assigned by the custodian to  
212 identify the trust's account; or

213 (b) Evidence linking the account to the trust.

214 Section 13. Section 740.03, Florida Statutes, is created  
215 to read:

216 740.03 Disclosure of other digital assets held in trust  
217 when trustee is not the original user.—Unless otherwise ordered  
218 by the court, directed by the user, or provided in a trust, a  
219 custodian shall disclose to a trustee that is not an original  
220 user of an account, a catalog of electronic communications sent  
221 or received by an original or successor user and stored,





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222 carried, or maintained by the custodian in an account of the  
223 trust and any digital assets in which the trust has a right or  
224 interest, other than the content of electronic communications,  
225 if the trustee gives the custodian:

226 (1) A written request for disclosure which is in physical  
227 or electronic form;

228 (2) A certified copy of the trust instrument, or a  
229 certification of trust under s. 736.1017;

230 (3) A certification by the trustee, under penalty of  
231 perjury, that the trust exists and that the trustee is a  
232 currently acting trustee of the trust; and

233 (4) If requested by the custodian:

234 (a) A number, username, address, or other unique  
235 subscriber or account identifier assigned by the custodian to  
236 identify the trust's account; or

237 (b) Evidence linking the account to the trust.

238 Section 14. Section 740.04, Florida Statutes, is created  
239 to read:

240 740.04 Disclosure of digital assets to guardian of ward.—

241 (1) After an opportunity for a hearing under chapter 744,  
242 the court may grant a guardian access to the digital assets of a  
243 ward.

244 (2) Unless otherwise ordered by the court or directed by  
245 the user, a custodian shall disclose to a guardian the catalog  
246 of electronic communications sent or received by the ward and  
247 any digital assets in which the ward has a right or interest,



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248 other than the content of electronic communications, if the  
249 guardian gives the custodian:

250 (a) A written request for disclosure which is in physical  
251 or electronic form;

252 (b) A certified copy of letters of plenary guardianship of  
253 the property or the court order that gives the guardian  
254 authority over the digital assets of the ward; and

255 (c) If requested by the custodian:

256 1. A number, username, address, or other unique subscriber  
257 or account identifier assigned by the custodian to identify the  
258 ward's account; or

259 2. Evidence linking the account to the ward.

260 (3) A guardian with general authority to manage the  
261 property of a ward may request a custodian of the digital assets  
262 of the ward to suspend or terminate an account of the ward for  
263 good cause. A request made under this section must be  
264 accompanied by a certified copy of the court order giving the  
265 guardian authority over the ward's property.

266 Section 15. Section 740.05, Florida Statutes, is created  
267 to read:

268 740.05 Fiduciary duty and authority.—

269 (1) The legal duties imposed on a fiduciary charged with  
270 managing tangible property apply to the management of digital  
271 assets, including:

272 (a) The duty of care;

273 (b) The duty of loyalty; and



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- 274 (c) The duty of confidentiality.
- 275 (2) A fiduciary's or designated recipient's authority with  
276 respect to a digital asset of a user:
- 277 (a) Except as otherwise provided in s. 740.003, is subject  
278 to the applicable terms-of-service agreement;
- 279 (b) Is subject to other applicable law, including  
280 copyright law;
- 281 (c) In the case of a fiduciary, is limited by the scope of  
282 the fiduciary's duties; and
- 283 (d) May not be used to impersonate the user.
- 284 (3) A fiduciary with authority over the tangible personal  
285 property of a decedent, ward, principal, or settlor has the  
286 right to access any digital asset in which the decedent, ward,  
287 principal, or settlor had or has a right or interest and that is  
288 not held by a custodian or subject to a terms-of-service  
289 agreement.
- 290 (4) A fiduciary acting within the scope of the fiduciary's  
291 duties is an authorized user of the property of the decedent,  
292 ward, principal, or settlor for the purpose of applicable  
293 computer fraud and unauthorized computer access laws, including  
294 under chapter 815.
- 295 (5) A fiduciary with authority over the tangible personal  
296 property of a decedent, ward, principal, or settlor:
- 297 (a) Has the right to access the property and any digital  
298 asset stored in it; and



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299 (b) Is an authorized user for the purpose of computer  
300 fraud and unauthorized computer access laws, including under  
301 chapter 815.

302 (6) A custodian may disclose information in an account to  
303 a fiduciary of the user when the information is required to  
304 terminate an account used to access digital assets licensed to  
305 the user.

306 (7) A fiduciary of a user may request a custodian to  
307 terminate the user's account. A request for termination must be  
308 in writing, in paper or electronic form, and accompanied by:

309 (a) If the user is deceased, a certified copy of the death  
310 certificate of the user;

311 (b) A certified copy of the letters of administration; the  
312 order authorizing a curator or administrator ad litem; the order  
313 of summary administration issued pursuant to chapter 735; or the  
314 court order, power of attorney, or trust giving the fiduciary  
315 authority over the account; and

316 (c) If requested by the custodian:

317 1. A number, username, address, or other unique subscriber  
318 or account identifier assigned by the custodian to identify the  
319 user's account;

320 2. Evidence linking the account to the user; or

321 3. A finding by the court that the user had a specific  
322 account with the custodian, identifiable by the information  
323 specified in subparagraph 1.



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324 Section 16. Section 740.06, Florida Statutes, is created  
325 to read:

326 740.06 Custodian compliance and immunity.-

327 (1) Not later than 60 days after receipt of the  
328 information required under ss. 740.006-740.04, a custodian shall  
329 comply with a request under this chapter from a fiduciary or  
330 designated recipient to disclose digital assets or terminate an  
331 account. If the custodian fails to comply, the fiduciary or  
332 designated recipient may apply to the court for an order  
333 directing compliance.

334 (2) An order under subsection (1) directing compliance  
335 must contain a finding that compliance is not in violation of 18  
336 U.S.C. s. 2702.

337 (3) A custodian may notify a user that a request for  
338 disclosure or to terminate an account was made under this  
339 chapter.

340 (4) A custodian may deny a request under this chapter from  
341 a fiduciary or designated recipient for disclosure of

342 -----  
343  
344 **T I T L E A M E N D M E N T**

345 Remove lines 8-14 and insert:

346 to a designated recipient or to prohibit a custodian  
347 from disclosing digital assets under certain  
348 circumstances; providing that a specified user's  
349 direction overrides a contrary provision in a terms-



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350 of-service agreement under certain circumstances;  
351 creating s. 740.004, F.S.; providing construction;  
352 authorizing the modification of a fiduciary's or  
353 designated recipient's access to digital assets under  
354 certain circumstances;



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB JDC 16-01 Juror Costs  
**SPONSOR(S):** Judiciary Committee  
**TIED BILLS:** None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		Aziz PA	Havlicak RH

SUMMARY ANALYSIS

Prior to 2008, state general revenue funds were used to pay juror and witness payments, as well as juror meals and lodging. Each clerk of court prepared quarterly estimates of the needed funds for the Office of State Courts Administrator. Based on these estimates, state funding was distributed to each clerk of courts. In 2008, the Legislature amended the law to require the clerk of the courts to pay those costs.

This Proposed Committee Bill (PCB) would transfer the costs of juror payments, and juror meals and lodging back to the state. This PCB provides that each clerk of court will prepare quarterly estimates of the needed funds for the Justice Administrative Commission and, based on these estimates, state funding will be distributed to each clerk of courts.

The PCB provides guidance for paying prorated shares to counties in the event that the appropriation is insufficient.

The estimated cost of juror payments, and juror meals and lodging for Fiscal Year 2016-2017 is \$11.7 million. This PCB will have an annual negative impact on general revenue funds in that amount. The states' clerk of the courts will see a recurring decrease in expenditures in that amount. The necessary appropriation to the Justice Administrative Commission will be included in the FY 2016-17 House proposed General Appropriation Act.

The bill is effective July 1, 2016.



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

In 1998, Florida voters approved Revision 7 to Article V of the State Constitution, which required the state to pay certain costs in the judicial system that had previously been county responsibilities. These changes were effective July 1, 2004. To that end, the Legislature defined the elements of the state courts system and assigned funding responsibilities to the state and local governments. State government began paying additional operational costs such as court appointed counsel. County governments continued to pay for facilities, communications, and security for the court system entities. The constitutional amendment also required the 67 county clerks of court to fund their offices using revenues derived from service charges, court costs, filing fees and fines assessed in civil and criminal proceedings. In 2004, s. 28.35, F.S., was amended to require the clerks to pay the payment of jurors and witnesses and the processing of jurors.<sup>1</sup> In 2008, the statute was amended to clarify that the clerks were responsible for paying for juror meals and lodging as well as juror and witness payments.<sup>2</sup>

Prior to 2008, state general revenue funds were used to pay juror and witness payments, as well as juror meals and lodging. Each clerk of court prepared quarterly estimates of the needed funds for the Office of State Courts Administrator. Based on these estimates, state funding was distributed to each clerk of courts. In 2008, the Legislature amended the law to require the clerk of the courts to pay those costs from filing fees, service charges, court costs and fines.<sup>3</sup>

Section 28.35, F.S., currently authorizes the clerks to pay for juror meals and lodging as well as juror and witness payments from filing fees, service charges, costs and fines. Chapter 40, F.S, provides for the management and operations of the state jury system. The chapter specifies that the clerk of the court is responsible for paying for juror payments and meals and lodging.

##### **Effect of the Bill**

This Proposed Committee Bill (PCB) would transfer the responsibility for the costs of juror payments, and juror meals and lodging back to the state.

This PCB amends s. 28.35, F.S., to remove the authorization of the clerks to pay for juror payments and meals and lodging from filing fees, service charges, costs and fines. The PCB amends s. 40.29, F.S., to provide that each clerk of court will prepare quarterly estimates of the needed funds for the Justice Administrative Commission and, based on these estimates, state funding will be distributed to each clerk of courts.

The PCB also amends s. 40.31, F.S., to provide that if the amount of the appropriation is not sufficient to fund such jury costs during the fiscal year, the Justice Administrative Commission may apportion the funds to the clerks and any deficit would be paid by warrant. Likewise, in a deficit situation the clerks would pay jurors by certificate of the amount of compensation still due. This procedure mirrors current law in respect to witness payments. Sections 40.24, 40.32, 40.33, and 40.34, F.S., are amended to conform to the provisions of the PCB.

#### B. SECTION DIRECTORY:

Section 1. Amends s. 28.35, F.S., relating to the Clerks of Court Operations Corporation.

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<sup>1</sup> Ch. 2004-265, Laws of Fla.

<sup>2</sup> Ch. 2008-111, Laws of Fla.

<sup>3</sup> *Id.*

Section 2. Amends s. 40.24, F.S., relating to the clerk's compensation and reimbursement policy.

Section 3. Amends s. 40.29, F.S., relating to payment of due process costs.

Section 4. Amends s. 40.31, F.S., relating to the Justice Administrative Commission.

Section 5. Amends s. 40.32, F.S., relating to payments to jurors and witnesses.

Section 6. Amends s. 40.33, F.S., relating to deficiency of funds for payment.

Section 7. Amends s. 40.34, F.S., relating to clerk's payroll.

Section 8. Provides and effective date of July 1, 2016.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

This PCB does not appear to have any impact on state revenues.

#### 2. Expenditures:

The estimated cost of juror payments, and juror meals and lodging for Fiscal Year 2016-2017 is \$11.7 million. This PCB will have an annual negative impact on general revenue funds in that amount. The necessary appropriation to the Justice Administrative Commission will be included in the FY 2016-17 House proposed General Appropriation Act.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

This PCB does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The estimated cost of juror payments, and juror meals and lodging for Fiscal Year 2016-2017 is \$11.7 million. The states' clerk of the courts will see a recurring decrease in expenditures in that amount.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This PCB does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

The PCB does not appear to create the need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

1                   A bill to be entitled  
 2           An act relating to juror costs; amending s. 28.35,  
 3           F.S.; revising the list of court-related functions  
 4           that clerks may fund from filing fees, service  
 5           charges, costs, and fines; amending s. 40.24, F.S.;  
 6           conforming provisions to changes made by the act;  
 7           amending s. 40.29, F.S.; requiring the clerk to  
 8           forward quarterly estimates on certain jury-related  
 9           costs to the Justice Administrative Commission;  
 10          revising procedures governing the payment of certain  
 11          costs; amending s. 40.31, F.S.; authorizing the  
 12          commission to apportion funds for specified jury-  
 13          related costs in certain circumstances; providing for  
 14          issuance to jurors of certificates for the amount of  
 15          compensation still due in certain circumstances;  
 16          amending s. 40.32, F.S.; conforming provisions to  
 17          changes made by the act; amending s. 40.33, F.S.;  
 18          authorizing the clerk to make requests to the  
 19          commission for additional funds to pay certain costs  
 20          in the event of a deficiency; amending s. 40.34, F.S.;  
 21          requiring the clerk to provide for payroll in  
 22          triplicate for the payment of jurors; requiring the  
 23          clerk to forward a specified number of copies of juror  
 24          payrolls to the commission by a specified date;  
 25          requiring the commission to audit such payrolls;  
 26          providing an effective date.

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

Section 1. Paragraph (a) of subsection (3) of section 28.35, Florida Statutes, is amended to read:

28.35 Florida Clerks of Court Operations Corporation.—

(3)(a) The list of court-related functions that clerks may fund from filing fees, service charges, costs, and fines is limited to those functions expressly authorized by law or court rule. Those functions include the following: case maintenance; records management; court preparation and attendance; processing the assignment, reopening, and reassignment of cases; processing of appeals; collection and distribution of fines, fees, service charges, and court costs; processing of bond forfeiture payments; ~~payment of jurors and witnesses; payment of expenses for meals or lodging provided to jurors;~~ data collection and reporting; processing of jurors; determinations of indigent status; and paying reasonable administrative support costs to enable the clerk of the court to carry out these court-related functions.

Section 2. Subsections (3), (4), and (5) of section 40.24, Florida Statutes, are amended to read:

40.24 Compensation and reimbursement policy.—

(3)(a) Jurors who are regularly employed and who continue to receive regular wages while serving as a juror are not entitled to receive compensation from the state ~~clerk of the~~

53 ~~circuit court~~ for the first 3 days of juror service.

54 (b) Jurors who are not regularly employed or who do not  
 55 continue to receive regular wages while serving as a juror are  
 56 entitled to receive \$15 per day for the first 3 days of juror  
 57 service.

58 (4) Each juror who serves more than 3 days is entitled to  
 59 be paid by the state ~~clerk of the circuit court~~ for the fourth  
 60 day of service and each day thereafter at the rate of \$30 per  
 61 day of service.

62 (5) Jurors are not entitled to additional reimbursement by  
 63 the state ~~clerk of the circuit court~~ for travel or other out-of-  
 64 pocket expenses.

65 Section 3. Section 40.29, Florida Statutes, is amended to  
 66 read:

67 40.29 Payment of due-process costs.-

68 (1) (a) Each clerk of the circuit court, on behalf of the  
 69 state attorney, private court-appointed counsel, the public  
 70 defender, and the criminal conflict and civil regional counsel,  
 71 shall forward to the Justice Administrative Commission, by  
 72 county, a quarterly estimate of funds necessary to pay for  
 73 ordinary witnesses, including, but not limited to, witnesses in  
 74 civil traffic cases and witnesses of the state attorney, the  
 75 public defender, criminal conflict and civil regional counsel,  
 76 private court-appointed counsel, and persons determined to be  
 77 indigent for costs. Each quarter of the state fiscal year, the  
 78 commission, based upon the estimates, shall advance funds to

79 each clerk to pay for these ordinary witnesses from state funds  
 80 specifically appropriated for the payment of ordinary witnesses.

81 (b) Each clerk of the circuit court shall forward to the  
 82 Justice Administrative Commission a quarterly estimate of funds  
 83 necessary to pay compensation to jurors and for meals or lodging  
 84 provided to jurors.

85 (2) Upon receipt of an estimate pursuant to subsection  
 86 (1), the Justice Administrative Commission shall endorse the  
 87 amount deemed necessary for payment by the clerk of the court  
 88 during the quarterly fiscal period and shall submit a request  
 89 for payment to the Chief Financial Officer.

90 (3) Upon receipt of the funds from the Chief Financial  
 91 Officer, the clerk of the court shall pay all invoices approved  
 92 and submitted by the state attorney, the public defender, the  
 93 clerk of the court, criminal conflict and civil regional  
 94 counsel, and private court-appointed counsel for the items  
 95 enumerated in subsection (1).

96 (4) After review for compliance with applicable rates and  
 97 requirements, the Justice Administrative Commission shall pay  
 98 all due process service related invoices, except those  
 99 enumerated in subsection (1), approved and submitted by the  
 100 state attorney, the public defender, the clerk of the court,  
 101 criminal conflict and civil regional counsel, or private court-  
 102 appointed counsel in accordance with the applicable requirements  
 103 of ss. 29.005, 29.006, and 29.007.

104 Section 4. Section 40.31, Florida Statutes, is amended to

105 read:

106 40.31 Justice Administrative Commission; apportionment of  
 107 funds; insufficient appropriations ~~may apportion appropriation.~~

108 (1) If the Justice Administrative Commission has reason to  
 109 believe that the amount appropriated by the Legislature is  
 110 insufficient to meet the expenses of witnesses during the  
 111 remaining part of the state fiscal year, the commission may  
 112 apportion the money in the treasury for that purpose among the  
 113 several counties, basing such apportionment upon the amount  
 114 expended for the payment of witnesses in each county during the  
 115 prior fiscal year. In such case, each county shall be paid by  
 116 warrant, issued by the Chief Financial Officer, only the amount  
 117 so apportioned to each county, and, when the amount so  
 118 apportioned is insufficient to pay in full all the witnesses  
 119 during a quarterly fiscal period, the clerk of the court shall  
 120 apportion the money received pro rata among the witnesses  
 121 entitled to pay and shall give to each witness a certificate of  
 122 the amount of compensation still due, which certificate shall be  
 123 held by the commission as other demands against the state.

124 (2) If the Justice Administrative Commission has reason to  
 125 believe that the amount appropriated by the Legislature is  
 126 insufficient to meet expenses relating to compensation of jurors  
 127 and meals and lodging provided to jurors during the remaining  
 128 part of the state fiscal year, the commission may apportion the  
 129 money in the treasury for those purposes among the several  
 130 counties, basing such apportionment upon the amount expended for



131 such purposes in each county during the prior fiscal year. In  
 132 such case, each county shall be paid by warrant, issued by the  
 133 Chief Financial Officer, only the amount so apportioned to each  
 134 county. When the amount so apportioned is insufficient to pay in  
 135 full all jury-related expenses described herein during a  
 136 quarterly fiscal period, the clerk of the court shall pay jurors  
 137 entitled to pay before reimbursing any other jury-related  
 138 expenses described herein. If the amount so apportioned is  
 139 insufficient to pay in full all jurors during a quarterly fiscal  
 140 period, the clerk of the court shall apportion the money  
 141 received pro rata among the jurors entitled to pay and shall  
 142 give to each juror a certificate of the amount of compensation  
 143 still due, which certificate shall be held by the commission as  
 144 other demands against the state.

145 Section 5. Section 40.32, Florida Statutes, is amended to  
 146 read:

147 40.32 Clerks to disburse money; payments to jurors and  
 148 witnesses.-

149 (1) All moneys drawn from the treasury under ~~the~~  
 150 ~~provisions of~~ this chapter by the clerk of the court shall be  
 151 disbursed by the clerk of the court as far as needed in payment  
 152 of jurors and witnesses, except for expert witnesses paid under  
 153 a contract or other professional services agreement pursuant to  
 154 ss. 29.004, 29.005, 29.006, and 29.007, for the legal  
 155 compensation for service during the quarterly fiscal period for  
 156 which the moneys were drawn and for no other purposes.

157       ~~(2) The payment of jurors and the payment of expenses for~~  
 158 ~~meals and lodging for jurors under the provisions of this~~  
 159 ~~chapter are court-related functions that the clerk of the court~~  
 160 ~~shall fund from filing fees, service charges, court costs, and~~  
 161 ~~fees.~~

162       (2)~~(3)~~ Jurors and witnesses shall be paid by the clerk of  
 163 the court in cash, by check, or by warrant within 20 days after  
 164 completion of jury service or completion of service as a  
 165 witness.

166       (a) If the clerk of the court pays a juror or witness by  
 167 cash, the juror or witness shall sign the payroll in the  
 168 presence of the clerk, a deputy clerk, or some other person  
 169 designated by the clerk.

170       (b) If the clerk pays a juror or witness by warrant, he or  
 171 she shall endorse on the payroll opposite the juror's or  
 172 witness's name the words "Paid by warrant," giving the number  
 173 and date of the warrant.

174       Section 6. Section 40.33, Florida Statutes, is amended to  
 175 read:

176       40.33 Deficiency.—If the funds required for payment of the  
 177 items enumerated in s. 40.29(1) in any county during a quarterly  
 178 fiscal period exceeds the amount of the funds provided pursuant  
 179 to s. 40.29(3), the state attorney, public defender, clerk of  
 180 the circuit court, or criminal conflict and civil regional  
 181 counsel, as applicable, shall make a further request upon the  
 182 Justice Administrative Commission for the items enumerated in s.

183 40.29(1) for the amount necessary to allow for full payment.

184 Section 7. Section 40.34, Florida Statutes, is amended to  
185 read:

186 40.34 Clerks to make triplicate payroll.—

187 (1) The clerk of the court shall make out a payroll in  
188 triplicate for the payment of jurors and witnesses, which  
189 payroll shall contain:

190 (a) The name of each juror and witness entitled to be paid  
191 with state funds;

192 (b) The number of days for which the jurors and witnesses  
193 are entitled to be paid;

194 (c) The number of miles traveled by each; and

195 (d) The total compensation each juror and witness is  
196 entitled to receive.

197 (2) The form of such payroll shall be prescribed by the  
198 Chief Financial Officer.

199 (3) Compensation paid a juror or witness shall be attested  
200 as provided in s. 40.32. The payroll shall be approved by the  
201 signature of the clerk, or his or her deputy, except for the  
202 payroll as to witnesses appearing before the state attorney,  
203 which payroll shall be approved by the signature of the state  
204 attorney or an assistant state attorney.

205 (4) The clerks of the courts shall forward two copies of  
206 such payrolls to the Justice Administrative Commission, within 2  
207 weeks after the last day of the quarterly fiscal period, and the  
208 commission shall audit such payrolls.

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Section 8. This act shall take effect July 1, 2016.